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HOW TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT



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Chapter 1

Overview

The Americans with Disabilities Act of 1990 (ADA) was signed by President Bush on July 26, 1990, guaranteeing fair employment practices and accessibility to a range of services for an estimated 43 million disabled individuals. Commentators agree that the impact of the new law is going to be substantial, even though there have been assurances that it was carefully drafted to allow flexibility. While some of the provisions do not take effect for several years, employers and businesses should start preparing now for compliance.

The new law is broken down into five major sections or titles. Title I prohibits discrimination in employment and Titles II through IV cover public services, public accommodations, and telecommunications. Title V covers a number of miscellaneous issues. What follows are highlights of each title's substantive provisions, as well as the effective dates and enforcement mechanisms for Titles I through IV.

TITLE I: EMPLOYMENT

(Sections 101 through 108)

This title prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, discharge, promotion, job training, and other similar conditions of employment. A number of the title's concepts are borrowed from the federal Rehabilitation Act of 1973, which already bars discrimination among federal government contractors and recipients of federal financial assistance. It is likely that the courts will look to decisions under that Act for guidance. One of the title's most important requirements is that employers must make "reasonable accommodations" for an individual's known disabilities, unless to do so would be an undue hardship. Employers are also required to post notices in a format accessible to applicants and employees describing the applicable provisions of the Act. The title contains a number of exemptions and exclusions from the term "disability." For details on some of these issues, see the "Employment" section of this book.

Effective date. Title I goes into effect on July 26, 1992 for employers with 25 or more employees, and on July 26, 1994 for employers with 15 or more employees.

Enforcement. The Equal Employment Opportunity Commission (EEOC) issued proposed regulations for the employment provisions on February 28, 1991 (included in Appendix B), and has until July to issue final regulations.

For complaints of employment discrimination, the ADA specifically adopts the same enforcement procedures and remedies as found in Title VII of the Civil Rights Act. This means that complaints must be filed with the EEOC, which will investigate and either sue the employer or issue the complaining individual a right-to-sue letter allowing him or her to sue.

If an employer is found to have discriminated, remedies can include back pay, reinstatement, and reasonable attorney's fees. Because the ADA adopts Title VII's remedies, if Title VII were to be amended, the remedies available under the ADA would also change.

TITLE II: PUBLIC SERVICES

(Sections 201 through 246)

This title covers public services provided by state and local governments. It has general provisions that prohibit the exclusion of disabled persons from participation in benefits, services, and activities offered by government entities, and also requires public transportation offered by public entities to be accessible. For details on the transportation provisions, see the "Transportation" section of this book.

Effective date. Except for the requirement that certain vehicles be accessible within 30 days after enactment (the day the law was signed by the president), the provisions of Title II become effective 18 months after enactment.

Enforcement. The Department of Justice is charged with enforcing Title II's general provisions, and the attorney general issued proposed regulations on February 28, 1991; final regulations are due by July. The Department of Transportation will enforce the public transit provisions; proposed regulations were issued on October 4, 1990 (see Appendix B for both sets of regulations).

Complaints can be filed with the enforcing agency, or an individual who believes that he or she is being discriminated against can file a private suit; the Justice Department can file suits against local governments. The title specifies that the remedies available are the same as those under the Rehabilitation Act—which would include damages and attorney's fees. An entity found to have discriminated can also lose its government funding.

TITLE III: PUBLIC ACCOMMODATIONS

(Sections 301 through 310)

This title guarantees to persons with disabilities access to privately operated places of public accommodation, i.e., restaurants, banks, retail stores, and other similar places. While the employment provisions of Title I are of the most immediate interest for employers, the provisions of Title III will also have an effect on how business is conducted. Among other things, the public accommodations provisions require covered entities to change their policies and practices to accommodate persons with disabilities, remove architectural barriers, and make new structures and remodeled areas accessible. For details, see the "Public Accommodations" section in this book. Private entities that provide public transportation are also required to make their vehicles and facilities accessible. See the "Transportation" section.

Effective date. This title becomes effective 18 months after enactment.

Enforcement. The Department of Transportation issued preliminary regulations on October 4, 1990 regarding the transportation services covered under the public accommodations title. The attorney general is required to issue final regulations on all other aspects of the title by July of 1991: proposed regulations were issued on February 22 (included in Appendix B). Both sets of regulations, in final form, must be consistent with the minimum guidelines and regulations issued by the Architectural and Transportation Barriers Compliance Board.

Any individual who is being or is about to be discriminated against is entitled to preventive relief. This means that facilities can be ordered to remove barriers, modify policies, provide aids, or otherwise make themselves accessible. The attorney general is also authorized to investigate alleged violations, make periodic compliance reviews, and file civil suits if there are pattern or practice violations. Remedies in these suits can include preventive relief and fines of up to \$50,000 for a first violation, and up to \$100,000 for subsequent violations.

TITLE IV: TELECOMMUNICATIONS

(Sections 401 through 402)

This title amends the Communications Act of 1934 to require telephone companies to provide interstate and intrastate telecommunications relay services so that hearing- and speech-impaired individuals can communicate with nondisabled individuals.

Effective date. The requirements of this title become effective three years after enactment.

Enforcement. The Federal Communications Commission (FCC) must issue regulations regarding these provisions within one year after enactment. Complaints alleging a violation of this title must be resolved by the FCC by a final order within 180 days after the complaint is filed.

TITLE V: MISCELLANEOUS PROVISIONS

This title's miscellaneous provisions:

- Authorize the awarding of reasonable attorney's fees in any proceeding under the Act
- Prohibit retaliation against or coercion of any person who makes a charge under the Act or opposes any practice prohibited by it
- Allow insurers to continue to rely on usual actuarial principles in underwriting risks
- Authorize state governments to be sued under the ADA
- Provide that state laws offering greater or equal protections are not pre-empted
- Amend the Rehabilitation Act to conform its coverage of drug users to that provided in the ADA.

Architectural and Transportation Barriers Compliance Board

The Board is required to issue minimum guidelines for purposes of Titles II and III regarding accessibility requirements for buildings, facilities, rail passenger cars, and vehicles. These were issued on January 22, 1991, and are included in Appendix B.

Technical Assistance

Each agency with enforcement responsibilities must provide technical assistance to employers and individuals that have rights and duties under the various titles. This assistance must be available six months after an agency issues its regulations. The Justice Department is required to develop a plan to assist the entities covered by the Act. This plan was issued on December 5, 1990, and suggests that the enforcement and other federal agencies provide, among other things, information hotlines, training, public service announcements, and information brochures and videos. The plan is included in Appendix B.

Chapter 2

Who Is Protected

A Word About "Legislative History and Committee Reports"

On its way to passage, the ADA went through a number of congressional committees, including the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources. The various reports issued by these committees explain some of the Act's concepts in detail and often provide helpful examples. Even after the enforcement agencies have issued their final regulations, these reports will continue to be looked to as an indication of the congressional intent behind certain language or concepts. Throughout our text, we will refer to these reports as "legislative history" or "committee reports."

DEFINING THE TERM 'DISABILITY'

Under the ADA, the definition of "disability" is meant to be comparable to the way "individual with handicaps" is used in the federal Rehabilitation Act and the federal Fair Housing Act. According to the committee reports, the change in terminology reflects the fact that many individuals with disabilities now object to the term "handicapped." But no change in meaning is intended, and the reports state that any case law, regulations, or administrative determinations that analyze "handicapped" also apply to the ADA's term "disability."

The Act's various protections generally extend to "qualified disabled individuals." While the meaning of the term "qualified" may vary slightly from title to title depending on the context, the Act defines disability as:

1. Any physical or mental impairment that substantially limits one or more of an individual's major life activities
2. A record of such an impairment
3. Being regarded by others as having such an impairment.

The definition has three separate parts, each specifying a separate set of circumstances that can be considered a disability. This means that an individual may be disabled within the meaning of the Act if he or she falls under any one of the three parts.

ACTUAL PHYSICAL AND MENTAL IMPAIRMENT

The first part of the disability definition refers to physical or mental impairments. Physical impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. Mental impairment means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The committee reports list many specific conditions, diseases, and infections that should be considered impairments, but emphasize that the list is not meant to be exhaustive, particularly when new disorders may develop in the future. The list includes such conditions as: orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; infection with the HIV virus; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; and drug addiction and alcoholism (both subject to certain restrictions). The term does not include simple physical characteristics, such as blue eyes or black hair. It also does not include environmental, cultural, or economic disadvantages. For example, having a prison record does not constitute a disability. If a person who has one of these characteristics also has a physical or mental impairment, however, that person will, of course, be considered to be disabled for purposes of the ADA.

Exclusions

The ADA specifically excludes a variety of so-called behavior disorders from the definition of disability: transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments and other sexual disorders; compulsive gambling; kleptomania; and pyromania.

The ADA also specifically excludes any individual who is *currently* using *illegal* drugs, and any psychoactive substance use disorder resulting from current use. An illegal drug is defined as any controlled substance whose use or distribution is prohibited by the

federal Controlled Substances Act. (21 USC 812). Illegal drug use does not include the use of drugs taken under the supervision of a licensed health care professional.

Substantial Limitation on Major Life Activities

Under the first part of the disability definition, an impairment is not considered a disability for purposes of the ADA unless it substantially limits one or more major life activities. The reports do not elaborate much on the meaning of "substantially limits," but it apparently means that activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. The example given in the committee reports is that of a person who walks 10 continuous miles and begins to feel some pain on the eleventh mile. That individual cannot be characterized as substantially limited in walking because most people would not be able to walk 11 miles without experiencing some discomfort.

As to "major life activity," the committee reports say that the term means such functions as caring for one's self, performing manual tasks, walking, seeing, breathing, speaking, hearing, and working. For example, a deaf person is substantially limited in the major life activity of hearing aural communications, and a person with a lung disease, in the activity of breathing. Someone with a trivial impairment, such as a simple infected finger, by comparison is not impaired in any major life activity. The reports emphasize that determining whether an individual is substantially impaired in a major life activity must be made without reference to mitigating measures, such as reasonable accommodations or auxiliary aids. For example, if an individual is hard of hearing but the loss can be corrected with a hearing aid, that person is still considered disabled. Similarly, an individual with diabetes may be considered disabled even though the diabetes is controlled with medication.

HAVING A RECORD OF A DISABILITY; BEING REGARDED AS DISABLED

The second part of the disability definition—having a record of a disability—includes those who have a record of a physical or mental impairment that substantially limits a major life activity. This generally includes two groups of people: those who have "recovered" and therefore have a history of an impairment, and those who have been misclassified as having an impairment. Persons with histories of mental or emotional illness, heart disease, or cancer are common examples among the first group; those who have been misclassified as being mentally retarded are a common example of the second group.

The third part of the disability definition—being regarded as having a disability—covers individuals in any of the three following circumstances:

1. Individuals whose impairments are not necessarily limitations but who are treated by employers as being limited or as being more limited than they really are, for example,

someone who is rejected for a job because he or she has a visual impairment that is corrected by a eyeglasses.

2. Individuals whose impairments become limitations only because of the prejudicial attitudes of others—for example, a burn victim who is disfigured or an individual with HIV infection.

3. Individuals who have no actual impairment, but are mistakenly treated as having one—for example, when it is feared that an individual who had cancer 20 years ago will have a recurrence.

From these examples it can be seen how these groups can sometimes overlap. For instance, the individual who had cancer 20 years ago may be mistakenly regarded by others as having a disability, but may also be considered to be someone who has a record of an impairment.

The leading court case on this issue is the U.S. Supreme Court's decision in *School Board of Nassau County v. Arline*, a case decided under the Rehabilitation Act. (See Appendix B for text of decision.) *Arline* involved a school teacher who had been hospitalized for tuberculosis in 1957, was in remission for 20 years, and then was discharged when she suffered three relapses in two years. The Court found that Arline's hospitalization 20 years before was enough to establish her as a disabled person because she had a record of an impairment. The school board had argued that it did not discharge Arline because she had a record of an impairment, but because she was possibly contagious. But in response to that argument, the Court ruled that Arline was also someone who was "regarded by others" as having a disability because people feared infection when, in fact, there was no showing that Arline posed any threat to others in the workplace.

It will probably be easier for employers to establish that an individual is disabled if he or she fits under the first part of the disability definition. When dealing with an individual who might fall under part two or three, employers should err on the side of treating the individual as disabled.

DEFINING THE TERM 'QUALIFIED DISABLED INDIVIDUAL'

Once it has been established that an individual fits the definition of disabled, to be protected by the ADA that individual must also be "qualified." Under Titles II through IV, this generally means that the individual must be eligible for the services or benefits in question. In the employment context, it becomes more complicated: To be considered qualified under Title I, an individual must be able to perform the essential functions of the job in question, with or without reasonable accommodation. According to the ADA's

legislative history, this "qualified" concept is modeled after the regulations that interpret the Rehabilitation Act. (See Appendix B.)

The term "essential functions" means job tasks that are fundamental or nonmarginal rather than marginal. For example, an employer may say that a particular job, perhaps a stock clerk or clerical support job, requires possession of a driver's license because the employee may have to do an occasional errand. The driving task is a marginal one, so the license requirement may not be used to exclude applicants who cannot drive because of their disabilities. The legislative history gives little guidance on how an employer is to deal with these marginal tasks, but apparently they are to be assigned to co-workers or to hired helpers.

With respect to these essential functions, the ADA specifically states that consideration must be given to an employer's judgment as to what job functions are essential, and if an employer prepares a written job description before advertising or interviewing, that description will be considered to be some evidence of the essential functions.

Most pre-ADA job descriptions were probably not prepared with this essential-functions concept in mind, so employers should review any descriptions already in use. Employers need to ensure that they are not including nonessential functions or omitting essential ones.

CHOOSING THE BEST QUALIFIED WORKER

The ADA's legislative history emphasizes that the new law is not meant to take away an employer's right to choose the best qualified candidate, as long as an individual's disability or need for accommodation does not influence that decision. For example, suppose an employer has an opening for a typist, and two individuals apply. One is a disabled individual who types 50 words per minute, and the other is an individual without a disability who types 70 words per minute. The employer is free to hire the candidate who types faster, provided typing speed is necessary for successful job performance.

However, suppose two individuals with the same typing speed apply, but one has a hearing impairment that would require the employer to provide a telephone headset with an amplifier. The individual without the hearing disability may not be preferred and the disabled individual rejected simply because the employer does not want to provide an accommodation. This example differs from the first because the employer who chooses the individual with the faster typing speed is basing the employment decision on reasons unrelated to the disability or a need for accommodation.

Qualification Standards, Health and Safety Threats

The ADA specifically provides, however, that an employer may use tests and other qualification standards, even if they tend to screen out disabled applicants, provided the

tests or standards are job related and tied to business necessity and job performance. For example, a jewelry store that experiences frequent "snatch and run" thefts could most likely require its security guards to have certain mobility and dexterity skills.

The Act also specifically provides that as a qualification standard an employer may require that an individual not pose a direct threat to the health or safety of others in the workplace. This determination of direct threat must be made on a case-by-case basis and cannot be based on generalizations, misperceptions, or patronizing attitudes. The employer must identify the particular risk that the individual poses, the risk must be significant rather than speculative or remote, and it must be significant even after reasonable accommodation is considered. For individuals with mental disabilities, the employer cannot act based on generalities about the disability, but must identify the particular individual's specific behavior that poses a direct threat.

Chapter 3

Employers' Obligations

WHAT DOES THE ADA PROHIBIT?

Title I of the ADA prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, discharge, promotion, job training, and other similar conditions of employment. Both private and public employers are covered, as well as employment agencies, labor organizations, and joint labor-management committees. The employment provisions are phased in over several years: They go into effect on July 26, 1992 for employers with 25 or more employees, and on July 26, 1994 for employers with 15 or more employees. Commentators agree, however, that covered employers should begin planning now.

Exempted Employers

The employment provisions do not apply to the federal government, government-owned corporations, Indian tribes, and bona fide tax exempt private membership clubs. Congress and legislative agencies are covered, but will enforce the law through internal administrative procedures. The ADA permits religious organizations, including educational institutions, to give preference in employment to their own members.

SPECIFIC PROHIBITIONS

Section 102(a) of the ADA sets out the general rule prohibiting discriminatory employment practices. According to the committee reports, this section is meant to cover the full range of employment decisions:

1. Recruitment, advertising, and the processing of applications for employment;

2. Hiring, upgrading, promotion, tenure, demotion, transfer, layoff, termination, return from layoff, and rehiring;
3. Rates of pay or any other form of compensation and changes in compensation;
4. Job assignment, job classification, organizational structures, job descriptions, lines of progression, and seniority lists;
5. Leaves of absence, sick leave, or any other leaves;
6. Fringe benefits available by virtue of employment, regardless of whether administered by the covered employer;
7. Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and leaves of absence to pursue training;
8. Employer-sponsored activities, including social or recreational programs.

Limiting or Classifying

Section 102(b) describes more specific forms of discrimination that would be encompassed by the general prohibition. The first of these involves limiting, segregating, or classifying a job applicant or employee in a way that adversely affects opportunities or status because of the individual's disability (Sec. 102(b)(1)). This means that employers must make decisions based on facts applicable to the specific individual, rather than on presumptions as to what a class of individuals with a particular disability can or cannot do or on the basis of the individual's appearance. For example, an employer may not limit the job duties of an employee with a disability based on a presumption of what would be best for the employee or on a presumption about the individual's ability to perform certain tasks.

Employees with disabilities may not be segregated into specific work areas, and areas for nonwork activities, such as break rooms, should also be integrated. If a break or lunch room is located on an upper floor that is inaccessible to individuals with wheelchairs, those employees must have comparable amenities available to them on the first floor.

It is also a violation of this section to reject an applicant based on generalized fears about the safety of the applicant in the workplace or higher absenteeism rates. The committee reports note that a study conducted of nearly 1500 physically disabled employees at the duPont Company in 1973 showed that the disabled workers performed as well as or better than nondisabled workers with respect to job performance, safety records, and attendance.

Employers may not deny all health insurance coverage to individuals with disabilities, although it would be permissible to offer insurance that limits coverage for certain types of procedures—blood transfusions, for example—as long as the limitations apply equally to disabled and nondisabled workers. The ADA does not limit pre-existing-condition clauses in insurance policies offered by employers, although the clauses may not be used to evade the purposes of the Act.

Contracts

Employers may not enter into contracts or other arrangements that would have the effect of subjecting the employer's disabled job applicants or employees to discriminatory practices. This includes arrangements with an employment or referral agency, labor union, an organization providing fringe benefits to the employer's workers, or an organization providing training or apprenticeship programs (Sec. 102(b)(2)).

For example, if an employer contracts with a hotel to hold a conference for the employer's workers, that employer has a duty to investigate the accessibility of the areas the hotel plans to use. The employer should also make sure that the contract specifies that all rooms used for the conference will be accessible. If the hotel breaches that provision of the contract, then it would be liable for any costs the employer might incur.

This contracting provision makes covered entities responsible only for practices that discriminate against its *own* employees or applicants. It does not apply to a situation where the covered entity contracts with the hotel and the hotel is subjecting *hotel* employees or applicants to discriminatory practices.

Disparate Impact

The "disparate impact" theory of discrimination is expressly authorized by Section 102(b)(3), which prohibits employers from using standards, criteria, or other methods that have the effect of discriminating on the basis of disability, or of perpetuating the discrimination of other entities that are subject to the ADA. According to some commentators, the disparate impact theory has not been as familiar in the area of disability law as it has been in sex and race discrimination cases, so its inclusion in the ADA is an important development. Exactly what it will mean for employers will be worked out over time, presumably by the expected EEOC regulations and in the courts. But under a broad interpretation of the disparate impact standard, nearly every employment practice could end up being subject to challenge.

Association with a Disabled Person

Employers may not deny equal jobs or benefits to an individual because that individual is known to have a relationship with or associates with a disabled person. For example, if a job applicant discloses to the employer that her spouse is disabled, the employer may not reject that applicant based on the assumption that she will miss work or frequently leave early to care for her spouse. It should be noted that this type of protection is *not* limited to those who have a familial relationship with a disabled person (Sec. 102(b)(4)).

However, the ADA does not require the employer in our example to make special allowances for (reasonably accommodate) the nondisabled employee. If the employee

violates a neutral attendance or tardiness policy, she can be dismissed even if the reason for the lateness or tardiness is to care for the spouse.

Reasonable Accommodation

Employers are required to reasonably accommodate qualified, disabled applicants and employees, unless to do so would impose an undue hardship (Sec. 102(b)(5)). For details on the concepts of reasonable accommodation and undue hardship, see the following chapter.

Selection Criteria

Qualification standards, employment tests, and other selection criteria that screen out or tend to screen out individuals with disabilities may not be used unless they are job related and consistent with business necessity (Sec. 102(b)(6)). This area is the one where the disparate impact theory will have the greatest effect. According to the legislative history, the selection criterion is most likely lawful under the ADA if the criterion: (1) concerns an essential, nonmarginal aspect of the job and (2) is carefully tailored to measure an applicant's actual ability to perform this essential function. However, the criterion may not be used to exclude a disabled applicant if he or she can meet the criterion with reasonable accommodation.

For example, a written test will likely screen out applicants with dyslexia. If the job is essentially a manual one, then a written test may not be necessary and an oral test or a manual-skills test can be substituted. If the written test is being given because part of the job requires an applicant to read, then the test is a valid criterion. However, the applicant with dyslexia could perhaps be accommodated by hiring someone to act as a "reader."

The law also specifies that any employment test must be selected and administered so that the results accurately reflect the skills and aptitudes that the test is intended to measure. When a test is given to an applicant or employee who has a sensory, manual, or speaking disability, the results should not reflect those factors unless that is the intention of the test (Sec. 102(b)(7)).

MEDICAL EXAMINATIONS AND PRE-EMPLOYMENT INQUIRIES

An employer may not require a medical examination to determine whether a job applicant has a disability, ask an applicant whether he or she is disabled, or the extent of the disability. The ADA permits employers to ask only whether an applicant has the ability to perform job-related functions. For example, an employer may ask an applicant whether he or she has a driver's license if driving is an essential job function, but may not ask if the applicant has a visual disability.

Once an offer of employment has been made, however, an exam can be required and the offer conditioned on the results, provided all entering employees in that job category are given an exam regardless of disability. This means that a construction company, for instance, can test all construction laborers rather than all of the construction company's employees. Any information collected from exams must be kept in separate files and treated as confidential medical records, except that managers, first aid and safety personnel, and government officials may be provided relevant information on a need-to-know basis.

The results of post-offer exams can be used to screen out individuals with disabilities only if the disability will, in fact, limit the person's ability to do the job. According to the committee reports, an employer should not reject an asymptomatic candidate, for example, because an X-ray taken during the post-offer exam shows a back abnormality. However, if the examining doctor determines that there is a high probability of substantial harm were the candidate to perform the job, that candidate could be rejected unless he or she could be reasonably accommodated. The committee reports stress that employers should still use caution when relying on statements from the examining doctor. These statements can be challenged by a candidate's own doctor, who will know more about the disability and its effects on the candidate. Company doctors may be unfamiliar with certain disabilities and might assume that there are barriers to employment when in fact there are none.

Once an employee is on the job, actual job performance is the best indicator of an individual's ability. If the need arises to question an employee's continued ability to do the job, however, an employer may make inquiries or require medical exams that are job related. The Act is not meant to override testing requirements under federal, state, or local law. For example, federal safety regulations require bus and truck drivers to undergo periodic exams, and OSHA standards require employees exposed to lead or other hazardous substances to be tested at specific intervals.

Drug Testing

The Act does not prohibit employers from testing for illegal drugs or making employment decisions based on test results—such tests are not considered to be medical exams, although an employer's state law may prohibit these things. This means that applicants can be required to take a drug test before the job offer has been made, and employees can be tested without a showing that there is a job-related reason for the test.

The tests must, however, be limited to testing for illegal drugs. According to the legislative history, this means that testing cannot be done for prescription or experimental drugs taken under the supervision of a licensed health care professional. Many people with disabilities, such as AIDS or mental illness, take a variety of medications, including experimental drugs, and these individuals have a right not to have to disclose their medical conditions before a job offer has been made. In addition, some legally prescribed medications may register as illegal drugs.

Some commentators recommend that employers try to avoid these difficulties by testing *after* an offer has been made. Post-offer testing may also cost less because fewer individuals are tested. If the test results show illegal drug use, an employer can always withdraw the offer because current users of illegal drugs are not protected as disabled. (See the following section on "Defenses.")

DOES AN EMPLOYER HAVE ANY DEFENSES?

When a qualification standard, selection criteria, or other employment practice is challenged as discriminating against individuals with disabilities, an employer may have a number of defenses available.

First of all, an employer is not required to hire an applicant who cannot perform essential job functions.

Beyond that, and as a general rule, the ADA allows an employer to defend against discrimination charges by showing that the challenged practice is job-related and consistent with business necessity, and that reasonable accommodation would be an undue hardship (Sec. 103(a)).

The Act also specifies that an employer can set as a qualification standard the requirement that an individual not pose a direct threat to the health or safety of others in the workplace. This means that an employer may refuse to hire an applicant or may dismiss an employee because the individual poses a significant risk that cannot be eliminated by reasonable accommodation. According to the committee reports, these health and safety considerations often arise with respect to communicable diseases. The reports emphasize, however, that an individual with a communicable disease is considered a health and safety threat *only if* there is a significant risk of the disease being transmitted to others in the workplace.

Special Provision for Food Handlers

The secretary of health and human services is charged with publishing a list of infectious diseases that are transmitted through the handling of food and the methods by which the diseases are transmitted. If an employee has one of the diseases included on the list and the risk cannot be eliminated by reasonable accommodation, an employer may transfer that person to a job that does not involve food handling.

This provision is a compromise to a House-passed amendment that would have permitted employers to transfer employees with the AIDS virus, even though current medical evidence is that AIDS is not transmitted through the handling of food.

Religious Entities

It is not a discriminatory practice for religious associations, including educational institutions, to give preference in employment to individuals of that particular religion in

carrying out its activities or to require all employees to conform to its religious tenets. This means that, for instance, if a Mormon organization wants to hire only Mormons to perform certain jobs, and a person with a disability applies but is not a Mormon, the organization can refuse to hire that person. But if two Mormons apply—one with a disability and one without a disability—the organization may not discriminate against the applicant with the disability because of that disability.

Alcohol and Drugs

Current use of illegal drugs is not considered a disability under the Act when an employer's actions are based on that use. An employer is therefore free to refuse to hire an applicant or to discharge an employee because that individual is currently using illegal drugs. If the drug user is otherwise disabled an employer is still free to act based on the drug use, but must comply with the Act and may not discriminate on the basis of the person's disability. This means that an employer could refuse to hire an applicant or could discharge an employee because of the drug use, but not because of the disability.

Employers have a number of other rights with respect to alcohol and drugs. The Act specifically provides that an employer may hold an alcoholic employee to the same qualifications and job performance standards as other employees, even if unsatisfactory performance is caused by the alcoholism. Employers may also ban drug and alcohol use in the workplace, and require that employees not be under the influence of either substance while at work. If the employer is covered by the Drug Free Workplace Act, employees still have to comply with those requirements. Standards adopted by the departments of Defense and Transportation and the Nuclear Regulatory Commission continue to apply to employees subject to those regulations.

Chapter 4

Reasonable Accommodation

The ADA prohibits employers from discriminating against qualified individuals with disabilities. Discrimination may occur if employers fail to make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it can be demonstrated that the accommodation would impose an undue hardship on the business operation. Compliance with the reasonable accommodation provision, which imposes affirmative obligations upon employers, has been called the key to complying with the ADA. It's also anticipated that the biggest legal controversies will center on the reasonable accommodation requirement.

As is to be expected, there are gray areas regarding reasonable accommodation and undue hardship. These will not be resolved until the details of the ADA are worked out, and until the EEOC has issued its regulations and technical assistance manual. For now, we offer the perspective gleaned from the committee reports and other sources, and make suggestions from our vantage point in the field. Employers should always consult legal counsel if they have a particularly complicated situation, or for the "last word" on a subject.

'REASONABLE ACCOMMODATION': WHAT DOES IT MEAN?

The Act defines "reasonable accommodation" through an illustrative list of possible actions, including:

1. Making facilities accessible and usable
2. Acquiring or modifying equipment or devices

3. Job restructuring
4. Modifying work schedules
5. Reassigning to a vacant position
6. Adjusting or modifying examinations and training material or policies
7. Providing qualified readers or interpreters
8. Making other similar accommodations

The committee reports emphasize that this list is not exhaustive, but is intended to provide general guidance about the nature of an employer's obligation.

Commentators agree that the decision as to what reasonable accommodation is appropriate will be determined on a case-by-case basis, depending on the particular facts of the individual case. This fact-specific, case-by-case approach is generally consistent with the interpretation of reasonable accommodation under the federal Rehabilitation Act.

Who Must Be Accommodated

Reasonable accommodation must be made for an "otherwise qualified" applicant or employee. The term "otherwise qualified" is used to describe a person with a disability who meets all of an employer's job-related selection criteria except those that can't be met because of the disability, but which could be met with reasonable accommodation. This otherwise qualified individual must be offered the reasonable accommodation that will make him or her a "qualified individual with a disability" under the law.

When the Duty Arises

The duty to provide reasonable accommodation usually will be triggered by a request for accommodation from an applicant or employee. The law clearly states that employers must make reasonable accommodations to the "known" physical or mental limitations of an otherwise qualified individual. The obligation arises only where the employer knows of the impairment and the need to accommodate. Employers cannot be held responsible for failing to accommodate impairments of which they were unaware. Employers must, however, notify applicants and employees of their obligation to make reasonable accommodation.

According to the committee reports, if an employee with a known disability is having difficulty with job performance, the employer may bring up the possibility of a reasonable accommodation with that individual. On the other hand, it could be unlawful to provide accommodation that would have an adverse impact on the employee, without the person having requested it. For example, an employer would violate the law by suddenly transferring an employee with HIV infection who has had teaching responsibilities to a job where the individual has no contact with students.

CHOOSING A REASONABLE ACCOMMODATION

Commentators agree that the reasonable accommodation requirement is "best understood as a process in which barriers to a particular individual's equal employment opportunity are removed." The process focuses on an individual's needs in relation to problems in job performance because of an impairment. A problem-solving approach should therefore be used to identify the aspects of the work environment that limit performance and to identify possible accommodations that will lead to a meaningful employment opportunity.

After a request for an accommodation has been made, the employer should first consult with the individual to decide on the appropriate accommodation. If initial discussions fail to identify the proper accommodation, the reports suggest four informal steps that should be followed:

1. Step One—Identify skills and potential barriers to performance

The process begins with identifying barriers that make it difficult for a disabled employee to perform the job. This assessment should include identifying essential and nonessential elements of the job. If nonessential elements pose a serious problem, it would be wise to reassign to other employees or eliminate them, rather than try to accommodate. Identify, with the employee's help, the particular limitations being faced, and identify aspects of the work environment that are causing these limitations.

2. Step Two—Identify possible accommodations

Look to a number of sources to identify all possible accommodations that will help solve the limitation. Possible sources, in addition to the employee and employer, include: state vocational rehabilitation services agencies; the Job Accommodation Network (an information clearinghouse and resource center for employers and disabled job applicants); and other employers, especially those in the same industry. The disabled individual—sometimes having had a lifetime of experience making such assessments—is often the best source for identifying ways of doing tasks differently.

3. Step Three—Assess reasonableness of each accommodation

Assess the accommodation in terms of its effectiveness and the extent to which it achieves equal opportunity. Consider the reliability of the accommodation and whether it can be provided in a timely manner. The accommodation should provide a meaningful employment opportunity, i.e., allow the individual to attain the same performance level as a nondisabled individual with similar skills and abilities.

4. Step Four—Choose from among reasonable accommodations

There is some lack of clarity with regard to choosing among available accommodations. The House Report on the bill, for example, says that employers are

entitled to choose the less expensive or easier of two accommodations. The very next sentence, however, states that the individual's choice of accommodation must be given primary consideration, unless another effective accommodation exists that would provide meaningful equal employment opportunity or unless the requested accommodation would pose an undue hardship. Commentators say that until the conflict is resolved, either through regulation or litigation, employers should be entitled to insist upon an effective, but less expensive, accommodation. Prudent employers should, nevertheless, carefully document why they've decided their accommodation is preferable to that proposed by the individual.

Will an employer who follows the four-step process for choosing and implementing a reasonable accommodation be insulated from liability? Since the committee reports set forth in detail the four-step process, we believe that courts would likely give considerable weight to the fact that the process had been followed.

EXAMPLES OF REASONABLE ACCOMMODATIONS

Some accommodations are relatively inexpensive and appear reasonable, regardless of the size or financial strength of the employer. For example, simple accommodations might include rearranging office furniture, reserving parking spaces, providing a better chair for a worker with a bad back, or adjusting the height of a desk for an employee in a wheelchair.

Other examples of relatively inexpensive accommodations include: electronic visual aids for the visually impaired; telephones compatible with hearing aids and telephone amplifiers for the deaf; enlarging toilet facilities and installing a handrail for employees in wheelchairs; and mechanical page turners for other physically disabled employees. Employers are not required to provide nonjob-related personal use items such as hearing aids, seeing eye dogs, and eyeglasses.

Whether other accommodations (e.g., furnishing readers, elevators, modified rest rooms, or special assistance in transportation) are reasonable may depend on the cost to the employer and its size.

Job Restructuring

Job restructuring involves modifying the job or removing barriers to job performance, re delegating or exchanging assignments, and redesigning procedures to accomplish the essential functions of the job. Employers need not make any modification, adjustment, or change in a job description or policy that would fundamentally alter the essential functions of the job. Examples of job restructuring include allowing a clerk-typist returning from a mastectomy to mix typing with filing duties where prolonged typing causes pain, or allowing an RN who is a recovering drug abuser to trade some duties with other nurses in exchange for their dispensing drugs where drug handling is only a small

part of the nurse's total job responsibilities. The federal Rehabilitation Act does not require job restructuring.

Reassignment, Modified Schedules

The ADA list of accommodations reduces ambiguity under prior laws by including certain more controversial types of accommodation, such as job reassignment and modified work schedules. The committee reports suggest that flexible or adjusted work schedules can be a no-cost way to accommodate individuals who need medical treatment, for example, or those with mobility impairments who must rely on public transportation. While extra unpaid leave time may be one method of modifying the work schedule, disabled individuals would not be entitled to more paid leave time than nondisabled ones. Before reassigning a disabled employee to a vacant position, employers must attempt to accommodate the individual in the current job. In cases where the individual is no longer a "qualified disabled person" in the position currently held, employers will have to transfer an employee to a position that he or she is qualified to fill. This is a change from the federal Rehabilitation Act that did not require job reassignment. For example, an asthmatic employee unable to perform in the current job would have to be transferred to a vacant position requiring light work, even if the employer's policy does not allow such transfers to nondisabled employees.

Any reassignment that ultimately becomes necessary need only be to a vacant position. Although the ADA does not define the term "vacant position," it's clear that "bumping" another employee out of a job to create a vacancy is not required. It is unresolved if a vacancy is deemed to occur when an employee leaves a position that the employer does not intend to fill. Also unclear: when must employers discuss vacancies, must they hold vacant positions open for a period of time, and must employers post these openings?

The committee reports make clear that employers cannot avoid their reasonable accommodation duty in contractual relationships where another organization might discriminate on the basis of disability. For example, if an employer contracts with a company to plan an employee training session or to schedule a conference, the employer has a duty to ensure that reasonable accommodations are available to make the training or the conference accessible to disabled employees.

Readers, Interpreters

The law explicitly includes providing qualified readers or interpreters as examples of reasonable accommodations. Whether it would be reasonable to have to provide a full-time reader or interpreter would depend on the situation. As with readers and interpreters, providing an attendant to assist a disabled employee during parts of the workday may be a reasonable accommodation in a given case. The committee reports suggest that attendants may be required for traveling and other job-related functions.

In some cases, employers may have to make accommodations other than those listed. It's important to keep in mind that the duty to provide reasonable accommodation encompasses any appropriate response to the needs of a disabled individual that will provide the person with an equal opportunity to be employed or to advance in a job.

LIMITING THE DUTY TO ACCOMMODATE: UNDUE HARDSHIP

The ADA does not create an unlimited obligation for employers to provide reasonable accommodations. Employers do not have to provide a reasonable accommodation if they can demonstrate that the accommodation would impose an "undue hardship."

Defining the Term

The definition of this vital term under the ADA is rather imprecise. The law says that an "undue hardship" is an action requiring significant difficulty or expense when considered in light of a number of factors. It includes "an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."

It is clear that this is a higher standard than the minimal cost test required under Title VII of the Civil Rights Act of 1964 when an employer is asked to accommodate an individual's religious practices. Under the ADA, the employer must make a greater effort to accommodate. This higher standard is considered necessary, commentators say, because of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for disabled workers.

The definition of undue hardship is meant to be interpreted and applied consistently with its use under the federal Rehabilitation Act. Factors that should be considered in determining whether an accommodation would impose an undue hardship include: the nature and cost of the accommodation; the overall financial resources and workforce of the facility involved; the overall financial resources, number of employees and structure of the parent entity; and the type of operations of the covered entity, including the composition and functions of its workforce, and the administrative and fiscal relationships between the facility and the parent entity.

This list of factors is not exclusive, and other relevant factors may be considered. Terms and factors used to describe undue hardship make it clear that Congress chose to adopt a flexible approach as a limit on the duty to accommodate. The focus is on the impact of a needed accommodation on a particular business, rather than a flat dollar amount or rigid formula. For this reason, a House committee rejected a proposal that would have set a limit of over 10 percent of the employee's salary as a *per se* undue hardship. Some commentators have suggested that if an accommodation costs more than several hundred dollars, it would likely be considered an undue hardship, unless it is an extraordinary case.

Trying to set a dollar amount is probably a futile act. For example, where the costs of accommodations are substantial, if the additional dollar burden to the covered entity is a small fraction of the budget, the accommodations would not require significant expense and thus would not be an undue hardship.

Determining Undue Hardship

Making an undue hardship determination will depend upon the facts of the particular case, with weight given to the nature and cost of the accommodation in relation to the employer's resources and operations. For example, accommodating a hearing-impaired employee with a special telephone at minimal expense might be all that is required of a small daycare center, but a large school district might be required to make available a teacher's aide to a blind teaching applicant. As another example, accommodating an employee suffering from dwarfism in a position as a postal distribution clerk by either accompanying the clerk or providing a footstool from which the dwarf could fall would impose undue hardship in the form of health and safety risks and inefficiency.

The type of accommodation that is reasonable and does not cause undue hardship also depends upon the type of business in question. Site-specific factors to be considered may include the nature of the worksite. For example, it may be impossible to make a temporary construction site readily accessible to employees in wheelchairs, given the site's ever-changing boundaries. Obviously, some accommodations that can easily be made in an office setting may impose an undue hardship in a different setting.

Other factors to consider include the number of applicants or employees who potentially might benefit from a reasonable accommodation. Presumably, an otherwise undue hardship could become a reasonable accommodation if others would benefit from it. On the other hand, the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.

One significant difference between the federal Rehabilitation Act and the ADA is that courts under the ADA can look at the financial resources of local facilities, as well as the parent corporation, in determining reasonable accommodation and undue hardship. That means that a local facility owned by a larger entity may not be able to follow the same hardship standard as a similar local facility that stands alone. A local McDonald's, for example, might have to provide more accommodation than a "Mom and Pop" hamburger stand.

Where a reasonable accommodation would impose an undue hardship, the employer still is obligated to advise an applicant or employee of the potential accommodation and undue hardship. If the individual is willing to make his or her own arrangements for providing the accommodation, then the disabled individual must be permitted to provide the accommodation. For example, if the hardship issue is cost, the employer is obligated to pay for that portion of the cost that is reasonable, and must allow the employee or applicant

to pay the balance. Where public funding is available, the employer must investigate and attempt to obtain that funding.

Unresolved Areas

There are a number of issues that the ADA language itself and the legislative history have left unresolved.

Certain factors have been omitted from those that must be considered in determining undue hardship. The job itself and the value of the job are among those factors. To what extent will an accommodation and the undue hardship determination be related to a particular job? Does the value of the job to the employer play an important role in determining undue hardship?

Other omissions include the profit factor, changing financial conditions of the business, competition in the marketplace, the labor relations environment, and prior and continuing costs associated with other reasonable accommodations. No one knows what impact past employer accommodation costs, number and cost of employees already being accommodated, and continuing costs might have in determining whether new accommodation costs represent an undue hardship. May an employer create an annual accommodation budget and spend it on a first-come, first-served basis? If yes, then a few expensive accommodations early in the year may render the employer unable to provide less costly accommodations later. On the other hand, if employers cannot establish overall goals, then they may have virtually unlimited liability. That, of course, is contrary to taking into account the "overall financial resources" of the facility. It is to be hoped that the EEOC regulations will shed some light in these areas.

COLLECTIVE BARGAINING CONFLICTS

The ADA applies to unions as well as employers, and it prohibits employers from participating with a labor union if the effect is to subject a qualified disabled person to discrimination. The committee reports say that an employer's obligation to comply with the ADA overrides any inconsistencies in collective bargaining agreements. Thus, an employer cannot use a collective bargaining agreement to accomplish what would otherwise be prohibited under the Act. An agreement setting specific physical criteria that are not job related and discriminate against disabled individuals could be challenged under the Act.

Collective bargaining agreements could be relevant, however, in determining whether a given accommodation is reasonable. For example, if such an agreement sets aside certain jobs for employees with seniority, it may be considered as a factor in deciding whether it is a reasonable accommodation to assign a disabled employee without seniority to the job.

It is possible that accommodations such as job restructuring and reassignment of duties will interfere with collective bargaining agreements. Reassignment of a disabled employee to a vacant position may violate negotiated procedures for job bidding, transfers,

and posting. The committee reports recommend that collective bargaining agreements contain a clause permitting the employer to take all actions necessary to comply with the ADA.

Resources

In addition to various local and state rehabilitation service agencies, the following resources may be helpful in providing reasonable accommodation information:

Job Accommodation Network (JAN) can provide employers and job applicants with names of referral sources for placement. The toll-free number, (800) 526-7234, is available from 8 a.m. to 8 p.m. EST.

The federal Architectural and Transportation Barriers Compliance Board offers technical help to make physical plants accessible to the disabled. The number, (800) USA-ABLE, is available from 8 a.m. to 5 p.m. EST.

Mainstream, Inc. provides technical, legal, and practical advice for employers and disabled persons. The main number is (202) 898-1400.



Chapter 5

Public Accommodations

Basically, Title III of the ADA guarantees to disabled individuals the full and equal enjoyment of the goods, services, facilities, privileges, and advantages of any place of public accommodation. The requirement to extend full and equal enjoyment applies to privately owned places of public accommodation and to private entities that provide public transportation services. Although Title III deals with the providing of services only (and does not cover employment practices), it is probably the next most important title for employers because it affects the way they do business.

WHAT IS A PUBLIC ACCOMMODATION?

The Act says that the following private entities are considered public accommodations if they affect interstate commerce:

1. An inn, hotel, motel, or other place of lodging (except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor);
2. A restaurant, bar, or other establishment serving food or drink;
3. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
4. An auditorium, convention center, lecture hall, or other place of public gathering;
5. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

6. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, accountant's or lawyer's office, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
7. A terminal, depot, or other station used for specified public transportation;
8. A museum, library, gallery, or other place of public display or collection;
9. A park, zoo, amusement park, or other place of recreation;
10. A nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education;
11. A daycare center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service establishment;
12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Within each of these groupings, the Act lists a number of examples and in most of the categories adds the phrase "or other similar" places. According to the legislative history, this "other similar" phrase is to be interpreted liberally because that would be consistent with the intent of the legislation, i.e., that individuals with disabilities should have full access to establishments. For example, video stores would fall under the category of sales and rental establishments although not expressly mentioned there.

"Private or privately operated" means that establishments operated by the federal, state, or local governments are not included, although an entity is covered if it is private but receives government funding. Private schools are also covered, but the Act does not require them to provide a free, appropriate education or an individualized program to disabled students. However, this requirement is addressed by both the federal Rehabilitation Act and the Education for the Handicapped Act.

Exclusions

In addition to government-operated entities, Title III specifically exempts private membership clubs not covered by the Civil Rights Act and religious organizations or entities controlled by religious organizations. Residential housing is not covered by Title III because it is already covered by the federal Fair Housing Act.

Most Integrated Setting

The ADA specifies that services must be provided in the most integrated setting appropriate to the needs of the disabled individual, and that individuals must be given the chance to participate in existing programs and activities. According to the legislative history, this means that separate programs or activities that are designed to provide a benefit for disabled persons must not be used to restrict their participation in more general,

integrated activities. For example, it would not be unlawful for a recreational facility to offer specially designed programs for children with mobility impairments; but it *would* be unlawful to restrict the disabled children to those special programs only, or to exclude them from other recreational services available to nondisabled children.

MODIFYING POLICIES AND PRACTICES

A public accommodation must make reasonable modifications in its policies, practices, or procedures when necessary to allow disabled individuals access to goods and services. (Sec. 302(b)(2)(ii)). For example, a facility that does not allow dogs must modify that rule for a blind person with a seeing eye dog, or for another person with any other type of disability that requires a service dog.

Many modifications will require only simple policy changes, but a modification is not required to be made if it would fundamentally alter the nature of the goods or services. In this regard, the legislative history gives as an example a doctor who specializes in treating burn victims. That doctor could not refuse to treat the burns of a deaf individual because of the deafness, but would not have to accept the deaf individual as a patient if he or she does not have burns. Nor would the doctor have to provide other types of treatments to a disabled burn victim unless those treatments are also provided for nondisabled burn victims.

Auxiliary Aids and Services

A public accommodation is also required to provide the auxiliary aids and services necessary to allow disabled individuals to use the accommodation's goods and services (Sec. 302(b)(2)(iii)). These steps are not required if taking them would fundamentally alter the nature of the goods or services being offered, or would result in an undue burden.

As defined by the ADA, the term "auxiliary aids or services" includes:

1. For individuals with hearing impairments, providing qualified interpreters or other effective methods of making aurally delivered materials available;
2. For individuals with vision impairments, providing qualified readers, taped texts, or other effective methods of making visually delivered materials available;
3. Acquiring or modifying equipment or devices;
4. Other similar services and actions.

According to the legislative history, this list is not exhaustive and is meant only to suggest types of possible aids or services. For example, other effective aids for individuals with hearing impairments are telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for the deaf, closed captions, and decoders. Other

aids for individuals with vision impairments include audio recordings and braille and large-print materials.

The disabled individual should be consulted before an auxiliary aid or service is provided. Often, a simple adjustment or aide is all that is needed, rather than the expensive or elaborate item imagined. For example, a retail store need not lower all its shelves so that a person using a wheelchair can reach everything, but can instead have a salesperson assist with goods that are out of reach.

Undue Burden

Auxiliary aids need not be provided if doing so would cause the public accommodation an undue burden. This term is analogous to the term "undue hardship" that is used in the employment provisions of Title I. Whether there would be an undue burden is a determination that should be made on a case by case basis, taking into account the same factors used when determining undue hardship under the employment provisions of Title I, i.e., the nature and cost of the action needed, the financial resources, and number and type of employees at the facility involved and overall at the covered entity. (See the chapter on employers' obligations for more details.)

The fact that a particular aid would cause an undue burden does not relieve a public accommodation from the duty to furnish an alternative aid that would not, if available. Technological advances may require a business to provide in the future the same aid that today would not be required because it causes an undue burden.

REMOVING ARCHITECTURAL BARRIERS

Public accommodations are also required to remove architectural and communication barriers from existing facilities, and transportation barriers from existing vehicles and rail cars, where such steps are "readily achievable" (Sec. 302(b)(2)(A)(iv and v)). The factors to be considered when determining whether an action is readily achievable are the same as those for determining undue hardship or undue burden (see preceding section), but the ADA also defines "readily achievable" to mean easily accomplishable and able to be carried out without much difficulty or expense.

According to the legislative history, this means that the "readily achievable" standard is significantly lower than the undue hardship burden standards. In other words, if, when weighed against the preceding factors, a change cannot be easily accomplished or carried out without much difficulty or expense, the change is not required, even if making it would not cause an undue hardship.

The types of changes contemplated here include such modest adjustments as installing grab bars, ramping a few steps, lowering telephones, or the addition of raised lettering and braille markings on elevator buttons. The Act would also require the removal of physical barriers created by furniture or display arrangements; for example, a restaurant might have

to rearrange tables and chairs, or a retail store could adjust its layout of shelves and displays to provide access for persons who use wheelchairs.

A store would not be required, however, to separate every display fixture to provide clearance for a wheelchair. It is enough if the person has access to a representative selection of merchandise. As long as a person in a wheelchair can see that a store offers black leather jackets, for instance, it is permissible under the Act that he or she must rely on a salesperson to retrieve a jacket in the needed size. If access means replacing a flight of steps with expensive ramping or an elevator, that would be too expensive and burdensome in most cases to be considered readily achievable.

When removing a barrier is not readily achievable, the Act specifies that a public accommodation must make its goods or services available using alternative methods if those are readily achievable. Such methods might include coming to the door to receive or return dry cleaning, providing assistance in retrieving items in inaccessible places, and so on.

NEW CONSTRUCTION

All new places of public accommodation and commercial facilities must be designed and constructed to be readily accessible to and usable by individuals with disabilities, unless to do so would be "structurally impracticable." This requirement applies to all new entities ready for first occupancy after January 26, 1993 (Sec. 303(a)(1)).

What Is a Commercial Facility?

Unlike Section 302—which applies only to places of public accommodation—the requirements of Section 303 apply to commercial facilities as well. The Act defines a commercial facility as any nonresidential facility whose operations affect commerce. According to the legislative history, the term is designed to cover those structures not included within the specific definition of public accommodation, i.e., office buildings, factories, and other places where employees will come to work.

Exempted from the definition are residential facilities and certain rail cars and stations. The term also is not meant to make an entity that is not a place of public accommodation subject to other provisions of the title, e.g., the auxiliary aids provisions.

Readily Accessible

This term has been applied in a slightly varied form under such laws as the Fair Housing Act and the Architectural Barriers Act of 1968, and under regulations interpreting the Rehabilitation Act. It has also been part of standards used by federal agencies, such as the Uniform Federal Accessibility Standards (UFAS) and by the private sector, such as the American National Standards Institute (ANSI).

The term is intended to enable people with disabilities—patrons and employees alike—to get to, enter, and use a facility. It implies a high degree of accessibility—access to parking areas, routes to and from the facility, entrances, usable bathrooms and water fountains, and public and common use areas. However, access to *every* area of a facility is not required. For example, *all* parking spaces, *all* bathrooms, or *all* bathroom stalls need not be accessible as long as a reasonable number are. If the various facilities in question do not serve the same function, however, then each must be made readily accessible; meeting rooms in a conference center, for instance, may be used for different purposes at any time, so each room must be accessible.

The readily accessible standard also applies to employment areas. Access in and out of rooms is required, as well as an accessible path of travel in and around the employment area. The objective is that disabled employees must be able to get to the employment area, but the standard does not require that individual worksites initially be accessible or be outfitted with fixtures that would make it accessible to a disabled employee. Those types of modifications would fall under the duty of reasonable accommodation should a disabled person apply for a specific job. For example, if a builder installs racks and shelves at a worksite, they do not have to be made accessible. Once a qualified person with a disability applies for a job that would require him or her to work in that particular worksite, then whether the racks and shelves can be modified to allow the person to do the job becomes a matter of reasonable accommodation.

The legislative history emphasizes, however, that it is almost always less expensive to build something in an accessible manner or to position fixtures and equipment at the outset than to modify an existing facility or site later. Therefore, if it would not affect usability or enjoyment by the general public, facilities should consider building worksites, buying fixtures and equipment that are adjustable, and arranging them so that the need to reasonably accommodate a disabled person in the future will not be an undue hardship.

Elevators

Nothing in these requirements is meant to require the installation of elevators in a facility that is fewer than three stories or less than 3,000 square feet per story, unless the building is a shopping center or mall, or the professional office of a health care provider. The attorney general can also stipulate that a particular category of facilities requires that elevators be installed. If a facility does install elevators, then those elevators must be accessible to disabled persons.

Structurally Impracticable

The new construction requirements do not apply if it is structurally impracticable to make a new building accessible. This is a narrow exception, meant only for those rare and unusual circumstances where the terrain's unique characteristics make accessibility unusually difficult. For example, a new facility that must be built on stilts because of its

location over marshlands or over water is one of the few times that the structurally impracticable exception would apply; the exception would not apply to a building located in hilly terrain or on a plot of land with steep grades.

Even when a new building cannot be fully accessible, it must still incorporate those features that *are* structurally practicable. The building on stilts, for instance, cannot be ramped for persons who use wheelchairs, but that is no reason for it to be inaccessible for individuals with other types of disabilities.

ALTERING EXISTING FACILITIES

Where alterations are made that could affect the usability of an existing facility, those alterations must be done so that the altered portions are accessible and usable by disabled persons, to the maximum extent possible. In addition, if the alterations are to an area that contains a "primary function," they must be done so that the path of travel to the altered area, bathrooms, drinking fountains, and telephones are accessible. Travel paths, bathrooms, fountains, and telephones need not be made accessible if the cost of doing so is disproportionate to the total alteration cost (Sec. 303(a)(2)).

Minor changes such as painting or papering walls do not affect a facility's usability and so will not trigger the accessibility requirements. And Section 303 does not *require* alterations, but applies only if a facility decides to undertake alterations.

Primary Functions

The term "primary functions" refers to those portions of a place of public accommodation where significant goods, services, facilities, privileges, or advantages are provided. A storage room or boiler room is not an area containing a primary function, while the customer services lobby of a bank or the meeting rooms in a conference center are. According to the legislative history, the concept is analogous to the term "major activities" as it is used in the existing Uniform Federal Accessibility Standards (UFAS).

Paths of Travel

"Path of travel" to an altered area means a continuous, unobstructed pedestrian passage that allows the altered area to be approached, entered, used, and exited, and also connects the altered area with an exterior approach, an entrance to the facility, and other parts of the facility. The term can include sidewalks, curb ramps, clear floor paths, elevators and lifts, or any combination of these things. Again, the concept is meant to be analogous to the terms "accessible route" and "circulation path" as used in the UFAS.

As with new construction, the installation of elevators is required only under certain limited circumstances. (See the discussion on elevators in the "New Construction" section.)

Disproportionate Cost

The disproportionately of cost concept recognizes that in some circumstances achieving accessible paths, rest rooms, telephones, and drinking fountains would be an unreasonable requirement. According to the legislative history, the cost of accessibility features is disproportionate if it is sufficiently significant when compared to the overall cost of the planned alterations. For example, it would be disproportionate to require a place of public accommodation to double the cost of a planned alteration, and in almost all circumstances it would be disproportionate to increase the cost by more than 50 percent.

A place of public accommodation may not evade the accessibility requirements by making a series of smaller alterations that otherwise would have been a single undertaking. Also, if the cost of making *all* the accessibility alterations would be disproportionate, the place of public accommodation must provide a subset of those features that is not disproportionate. For example, if a path of travel cannot be provided because it would exceed the disproportionately limit, accessible rest rooms are still required if they would not exceed the limit. When a choice must be made among features, those that provide the greatest use of the facility should be selected. An accessible rest room, for instance, would have greater priority than an accessible drinking fountain. Local organizations that represent persons with disabilities should be able to assist in ranking various features. (See the section on "Sources of Help").

Chapter 6

Transportation

The ADA guarantees disabled individuals access to transportation services that are offered to the general public. Title II covers public entities that offer these services or contract with private entities to offer them, and Title III covers private entities. While many employers may not be directly affected by the transportation requirements, the committee reports stress that the Act's other protections in employment and public accommodations would be meaningless if individuals with disabilities could not travel freely. For that reason, we include a summary of the more important transportation provisions.

TITLE II: PUBLIC ENTITIES

This title defines public transportation to include transportation by bus, rail, or other conveyance that provides general or special services, including charter services, to the public on a regular or continuing basis. The term covers conveyances that operate on either a "fixed route" basis, which means that a vehicle is operated along a prescribed route according to a fixed schedule, or on a "demand responsive" basis, which means that a person must request transportation before any service is rendered. Air travel is not included under the ADA because it has been covered for years by the federal Air-Carrier Access Act. The committee reports specify, however, that Title II *does* cover public airport terminals and other related services, such as ground transportation.

Accessibility of Fixed Route Vehicles

New vehicles. Thirty days after the ADA's enactment, all new fixed route buses, intercity (Amtrak), commuter, rapid, or light rail (subway) vehicles that are bought for public transportation or for which solicitation is made, must be "readily accessible to and usable by" individuals with disabilities, including those who use wheelchairs.

Used vehicles. Public entities that purchase or lease used vehicles for public transportation after the date of enactment must make "demonstrated good-faith efforts" to purchase vehicles that are readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

Remanufactured vehicles. If a public entity remanufactures a vehicle, or buys or leases a remanufactured vehicle so as to extend its life for five years or more, that vehicle, to the maximum extent feasible, must be readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

Paratransit Transportation As a Supplement

If a public entity operates a fixed route public transportation system, it must also provide paratransit or other special transportation services to individuals with disabilities, including those who use wheelchairs, who otherwise cannot use the fixed route system. The paratransit services must offer a level of service as well as response time comparable to the fixed route system. If the public entity can show that meeting this requirement fully would pose an undue financial hardship, then the entity must provide whatever paratransit or other special services it can afford.

Demand Responsive Vehicles

Beginning 30 days after the ADA's enactment, newly purchased or leased vehicles that operate on a demand responsive system must be readily accessible to and usable by individuals with disabilities, including those who use wheelchairs. This requirement does not apply to any entity that can show that its system already provides individuals with disabilities a level of service equivalent to that provided to the general, nondisabled public.

Temporary Relief/Lifts

The secretary of transportation is authorized to temporarily relieve public entities of the obligation to purchase new buses accessible to individuals with disabilities if the entity can show that: (1) buses with lifts are unavailable, and (2) further delay in buying new buses would significantly impair transportation services in the community.

Facilities

New facilities. New facilities must be built to be readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

Alterations on existing facilities. When an existing facility is altered in a manner that affects or could affect its usability, the altered areas must, to the maximum extent feasible, be made readily accessible and usable.

Existing facilities. All stations in intercity rail systems and "key stations" in rapid rail, commuter rail, and light rail systems, must be made accessible and usable "as

soon as practicable." The Act itself does not define the term "key stations," but the committee reports say that the term includes high-ridership stations, such as those found in business and employment districts, cultural, educational, recreational, and entertainment centers, or transfer points to other forms of transportation.

Intercity rail stations must be made accessible no later than 20 years after the ADA's enactment. The secretary of transportation is authorized to extend that time for up to 20 more years if extraordinarily expensive structural changes to, or replacement of, existing facilities are needed to achieve accessibility.

TITLE III: PRIVATE ENTITIES

Entities Not Primarily Engaged in Transportation

The following requirements apply to any entity that is not covered under Title II and that operates a fixed route system, but whose principal business is not transporting people; for example, a hotel that operates an airport shuttle. If that type of entity buys or leases a vehicle capable of carrying more than 16 passengers—other than an over-the-road bus—that vehicle must be accessible to and usable by individuals with disabilities, including those who use wheelchairs. If the entity buys or leases a vehicle that carries *fewer* than 16 passengers, either the vehicle must be accessible or the entity must operate a system that ensures individuals with disabilities a level of service equivalent to the level of service provided to the general public.

These same provisions apply to entities that operate a demand responsive system and are not principally in the business of transporting people. However, all new vehicles that transport more than 16 passengers need not be accessible if the overall system provides individuals with disabilities a level of service equivalent to that provided to the general public.

Entities Primarily Engaged in Transportation

Private entities that are primarily engaged in the business of transporting people and whose operations affect commerce are generally prohibited from discriminating on the basis of disability in providing services. This prohibition does not cover air travel. More specifically, these entities may not:

- Use criteria that tend to screen out individuals with disabilities from the full use and enjoyment of the transportation services
- Fail to make reasonable modifications, provide auxiliary aids, or remove barriers as required of public accommodations
- Purchase or lease new vehicles, other than an automobile or over-the-road bus, that is not accessible.

For vehicles used on a demand responsive basis, new vehicles need not be accessible if an entity can show that the overall system provides individuals with disabilities a level of service equivalent to that provided the general public. Seven years after the ADA's enactment, new over-the-road buses that are purchased or leased by small providers (to be defined by the Department of Transportation (DOT)) must be accessible; all other providers must make new vehicles accessible beginning six years after enactment.

Office of Technology Study

The Office of Technology Assessment is required to undertake a study of over-the-road buses and determine the access needs of individuals with disabilities and the most cost-effective method for making buses accessible, particularly for individuals who use wheelchairs. The study must be completed and submitted to the president and Congress by July of 1993, and the DOT must issue final regulations within a year of the study. If the president determines as a result of the study that complying with the regulations' requirements for over-the-road buses would cause a significant reduction in intercity bus services, the president may extend the effective date of the regulations by one year.

Chapter 7

Questions and Answers

The following questions are ones we hear quite often. Readers are invited to submit their own questions to the BLR editors in writing, and we will make every effort to include the answers in upcoming supplements.

Does the ADA require employers to take affirmative action?

No. The Act requires that individuals with disabilities be given equal opportunity in employment and access to public services and accommodations. There are no affirmative action requirements, and employers do not have to prepare affirmative action plans. However, the Rehabilitation Act of 1973 *does* have affirmative action requirements, and employers subject to it must continue to meet those obligations.

The new law does not protect current users of illegal drugs, and also allows employers to test applicants and employees for illegal drugs at any time. The law in my state is different. What should I do?

The ADA itself provides that it does not pre-empt state laws that offer equal or greater protection to individuals. A few states prohibit drug testing altogether, and employers in these states may not test even though the ADA allows testing at any time. Other states regulate testing in some manner, for example, with respect to what types of tests may be conducted, what procedures must be followed, and so on. Employers in these states must also continue to follow these laws because they offer "greater protection."

Similarly, the ADA does not protect current users of illegal drugs, but some state disability laws do. Employers subject to one of these disability laws must continue to treat users as disabled even though the ADA does not.

Is AIDS a covered disability under the Act?

Yes, it is. The Act states that contagious diseases are protected disabilities as long as they do not pose a health or safety threat to others in the workplace. Since there is no medical evidence that AIDS can be transmitted through normal workplace contact, in most situations the health and safety issue would not be a consideration. Also, the committee reports specifically list AIDS as a covered disability.

Complying with these new requirements could be expensive. Is there any financial help for employers, especially small employers?

The 1990 tax package included an annual tax credit to help small employers comply with the ADA. For purposes of the tax credit, "small business" means a business that earns less than \$1 million and has 30 or fewer full-time workers in a taxable year. A small business can claim a tax credit for 50 percent of between \$250 and \$10,250 spent in the taxable year. Unused portions cannot be carried over to the next year. The credit does not cover new construction, but does cover the following:

- Removing architectural, communication, and other barriers that make the business inaccessible
- Providing interpreters or other methods for making aural materials available to individuals with hearing impairments
- Providing readers, taped texts, or other methods for making visual materials available to individuals with sight impairments
- Buying or modifying equipment
- Providing other "similar services."

There is also a \$15,000 tax credit available to all businesses for removing architectural and transportation barriers. The tax credit previously had been for \$35,000, but the tax package reduced this amount.

Also, under the Targeted Jobs Tax Credit program, an employer that hires an individual with a disability can take a tax credit equal to 40 percent of the first \$6,000 of the employee's first-year salary. The employer's deduction for wages must be reduced by the tax credit.

The ADA has a "No Retaliation" provision. What does this mean?

Section 503 of the Act prohibits retaliation against an individual for opposing practices that are unlawful under the Act, or for participating in an investigation of a complaint or in any aspect of an enforcement proceeding. The Section also makes it illegal to intimidate, coerce, threaten, or interfere with an individual with a disability who

exercises his or her rights under the Act, or an individual who aids another in exercising those rights.

This language protects both disabled and nondisabled persons. For example, if an employee with a disability files a complaint, and a nondisabled co-worker comes forward with supporting testimony, the employer may not discipline either employee. Anyone who is subjected to retaliation or threats is entitled to back pay, attorney's fees, reinstatement, or injunctive relief.

The Act lets an employer ask only whether a job applicant can perform job-related duties; an employer may not ask whether the applicant has a disability or about the nature or extent of any disability. But can an applicant be given the chance to self-identify, i.e., invited to voluntarily indicate whether and to what extent he or she is disabled?

According to the committee reports, an employer may invite individuals to self-identify only under certain circumstances, for example, if the employer has been ordered by the government to take remedial steps to correct the effects of past discrimination, or if the employer is a government contractor required by the Rehabilitation Act to take affirmative action.

When asking an applicant to self-identify, an employer must make it clear on the application form and orally in the interview that the information will be used only for remedial or affirmative action purposes, that it will be kept confidential, and that providing it is voluntary and refusing to respond will not be held against the applicant.

Employers under government order and those subject to the Rehabilitation Act may continue to ask applicants to self-identify even when the ADA takes effect. The issue of self-identifying under the ADA is one that will likely be addressed by the EEOC regulations.

During an employment interview, if an applicant's disability is obvious—for example, the applicant uses a wheelchair—may the interviewer ask about the disability?

It seems logical that an employer should be able to begin a discussion of reasonable accommodation once it becomes apparent to the employer that an applicant is disabled. However, the committee reports do not address this question, and the actual text of the ADA does not authorize an employer's initiating such a discussion. Again, this is an issue that should be clarified by the EEOC regulations.

What types of transportation are not covered by Titles II and III?

The transportation provisions of the ADA do not apply to: airlines (except terminals and related services), school bus transportation, railroad freight and caboose cars, taxis, automobiles, and certain historic vehicles. Over-the-road buses, meaning those with an

elevated passenger deck located over a baggage compartment, will be phased into coverage. The DOT must issue interim rules by July 1991 on nonstructural accommodations for passengers. The Office of Technology Assessment is required to make a study of structural accessibility by July 1993; once the study is completed, the DOT must issue final regulations. Large bus companies will have to comply with these final regulations by 1996; smaller companies, by 1997, unless these dates are extended for one year by the president.

When a place of public accommodation rents its space and must make alterations to meet accessibility requirements, who pays?

According to the committee reports, it depends on the terms of the rental agreement between the place of public accommodation—the tenant—and the landlord. If the agreement permits the tenant to make the types of alterations that are needed, then the tenant pays the costs. If the agreement reserves all authority for making modifications to the landlord and prohibits the tenant from doing so, then the landlord must pay. A landlord usually controls the common areas of a facility, and so would have responsibility for making any necessary modifications in those areas.

Chapter 8

Selected Readings

This chapter presents several readings on complying with the ADA's employment provisions. Upcoming supplements will continue to include articles by BLR editors and outside contributors on selected topics or from particular vantage points.

What to Do about Personnel Problems

National News Update

Issue No. 194 (Includes supplement)

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It's Time to Prepare for the ADA: Where Do You Turn? What Will It Cost?

A person who is blind applies for a receptionist's job at your company. What do you do—now that the Americans with Disabilities Act (ADA) has passed?

Long awaited and much feared by suspicious employers, the ADA was signed into law in late July. The legislation extends broad protections against discrimination in private employment to an estimated 43 million disabled individuals.

The new law prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, discharge, promotion, job training, and other similar conditions of employment. The law goes into effect on July 26, 1992 for employers of 25 or more employees. As of July 26, 1994, employers with 15 or more employees will be covered.

The impact of the law will be substantial. Employers already are asking a number of questions about their roles and responsibilities. For example, what accommodations will be required for various special needs of the disabled? Where do you find equipment such as optical readers? How much do you spend on equipment? When does the cost become "undue hardship" for the small-business owner? For the large company?

And, who has the answers to the questions? In short, *who you gonna call?*

Technical assistance manual

Eventually, the Equal Employment Opportunity Commission (EEOC) will publish a technical assistance manual. The Commission is now looking for ideas from employers about the kinds of technical assistance that will be most helpful to businesses. Regional EEOC forums will be held to identify concerns and to find businesses that already have had success hiring people with disabilities.

In addition, the EEOC is requesting ideas, comments, or concerns from the public to help the group develop proposed regulations to implement the legislation. The regulations will address issues such as "disability," "reasonable accommoda-

tion," and "undue hardship."

But the technical manual and the regulations aren't expected to be out for some time.

In the meantime, concerned employers are planning for the future and searching for qualified resources, both to comply with ADA and to respond to the labor needs of workforce 2000.

For these early-bird companies, fortunately, there already are a number of resources in place.

Resources in every community

- First, various rehabilitation services can be found in almost every community. Many have worked for years with members of the disabled community as well as with employers. There are state and local agencies, as well as other nonprofit groups. In some cases, the rehabilitation group will help pay the cost of equipment required for the job.
- The Job Accommodation Network (JAN) is an information clearinghouse and a resource center for employers and disabled job applicants. This network, located at West Virginia University, has operated since 1984.

JAN covers products, procedures, and policies. The network does not handle job placement, but often can provide employers and applicants with the names of referral sources for placement.

JAN's toll-free number, 1-800-526-7234, is available from 8 a.m. to 8 p.m. EST. In off-hours, callers can leave a message on the network's answering machine.

- The federal Architectural and Transportation Barriers Compliance Board has set up a toll-free number for businesses looking for technical help to make physical plants accessible to persons who are disabled. The number, 1-800-USA-ABLE, is available from 8 a.m. to 5 p.m. EST.
- Mainstream Inc., in Washington, D.C., provides technical, legal, and practical advice to employers, disabled persons, and service providers. The nonprofit group holds conferences and

training programs, and publishes a newsletter on major issues in the field.

The main number for Mainstream in Washington is (202) 898-1400.

At two locations, Washington, D.C., and Dallas, Texas, the organization also provides job placement services through a program called Mainstream Project Link.

Nothing to fear but fear itself?

Experts in the field stress that hiring and accommodating people who are disabled likely will not be as difficult or expensive as some fear. At JAN, an evaluation was conducted at the end of 1987. In part, the study looked at the costs of accommodations. Barbara Judy, the network's manager, said the study found that 81 percent of the accommodations cost less than \$1,000, while 31 percent of the accommodations actually cost nothing.

And while costs may have changed since that time, specialists point out that, still, many disabilities can be accommodated for very little.

In some cases, accommodation for a disabled person may be as simple as rearranging office furniture, changing round doorknobs to blade doorknobs, or installing special hinges on doors that are too narrow for wheelchairs.

Other cases may require some discussion, but since this is hardly virgin territory, it's more a matter of simply becoming familiar with contacts and resources that are available.

An example of finding an accommodation

For example, an employer might call JAN to find out how a blind applicant could be accommodated in a job. Staff at JAN would ask about job skills and the applicant's background. Then the staff member would discuss options with the employer, and these will differ from applicant to applicant. Some people who are blind may use a device called an optical reader that scans printed words in such a way that a blind person can read the words. Others may have been trained in braille. Different backgrounds will require different accommodations.

Attitude training most important

Judy pointed out that what is now needed in many workplaces is "attitude training"—looking at what's out there and trying to get a mindset that people with disabilities can work there.

"This whole program is not just to give disabled persons jobs. You hire them because they're qualified, and businesses need to know that." 637mmg

Reporter

The Disabilities Act: Advice and Tips for Employers

The new Americans with Disabilities Act (ADA)—and what it means for employers' hiring and selection practices—was one of the focal points of the 19th Annual Institute on Employment Law, sponsored recently by the Practising Law Institute in New York City.

ADA 'most comprehensive' bill since '64

According to Attorney Jana Howard Carey, of Venable, Baetjer and Howard in Baltimore, the ADA is the most comprehensive piece of legislation in the civil rights area since 1964. While the ADA doesn't enlarge the group of covered employers by much, because most employers are already covered by the federal Rehabilitation Act or state laws, it does enlarge their obligations.

For example, ADA excludes current drug abusers from its protections, but protects *former* users if they are rehabilitated and not currently using drugs. A program attendee from Pennsylvania reported that the federal court had just decided that a po-

lice department need not rehire a former abuser, and asked whether ADA would require a different result. The abuser most likely would have to be rehired under ADA, said Carey, unless the department could show that the individual still posed a risk to others even after rehabilitation.

Medical examinations and pre-employment inquiries are another area changed drastically by ADA. The Rehabilitation Act, as well as many state laws, permits medical exams for applicants provided the results are not used to screen out qualified disabled individuals, and lets employers make certain pre-employment inquiries about an applicant's disability. By contrast, the only pre-employment exam allowed under ADA is testing for illegal drugs; all other types of medical exams must wait until an offer of employment has been made. ADA also restricts pre-employment inquiries; an employer may ask whether an applicant has the ability to perform the job duties in question, i.e., whether an applicant has a driver's license, but

cannot ask about a specific disability, i.e., whether an applicant has sight problems.

What to do

In light of these and other changes under ADA, Carey offered the following tips for employers:

- **Job descriptions.** Draft job descriptions to include all essential duties; omit marginal duties. Describe the job in terms of what has to be done, and not in terms of physical attributes. If possible, have counsel evaluate the descriptions.
- **Want ads.** In advertisements and recruitment, forego all suggestions of physical or mental requirements, unless you're sure you have a bona fide occupational qualification (BFOQ). Carey urges employers to use caution here and gives as an example an actual client who owned a casino where an individual without hands applied to work as a dealer. The applicant showed that he was able to perform the job, even though all assumptions would be to the contrary.
- **Application forms.** On applica-

tion forms, do not ask questions about physical or mental ability. State that you do not discriminate against the disabled in your employment practices and that accommodations will be made for disabilities. Eliminate broad releases of medical information, i.e., do not have applicants promise to release or provide you with medical information.

- **Interviews.** During an interview, do not ask about an applicant's medical problems or about the medical problems of his or her family. Ask instead whether the applicant can perform the job's essential duties. If an applicant acknowledges a disability, tell that applicant that you are required to reasonably accommodate the disability, ask if he or she knows what accommodation might be

needed, and indicate that you will find out how the disability can be accommodated.

- **Testing.** When possible, get advice from local advocacy groups regarding what types of selection tests pose problems for disabled individuals.

- **References.** When checking references, do not ask former employers about an applicant's medical problems.

- **Accommodation.** Before choosing the new employee from the pool of applicants, decide whether you can reasonably accommodate any disabilities that have come to your attention. Assess the reasonableness of the needed accommodation, and if you can't provide it, ask the applicant whether he or she can. Then choose

the best applicant.

- **Medical exams.** Condition the offer of employment on a medical examination only if exams are required of all applicants for the same type of job. Ask the doctor who performs the exam what the applicant can and cannot do. Do not ask about specific medical conditions.

- **Re-evaluating.** If you have rejected a disabled applicant, re-evaluate whether you have considered all possible accommodations; make sure the rejection is based on the applicant's inability to perform an *essential* job function.

- **Promotions, transfers.** Remember that these suggestions are not limited to initial hiring practices, but also apply to promotion and transfer decisions. 8291a

What to Do about Personnel Problems

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Preparing for the ADA: Practical Advice For Hiring More Persons with Disabilities

Compliance deadlines for the Americans with Disabilities Act of 1990 (ADA) are only 18 months away for many employers. The new federal disability rights law has sweeping ramifications for virtually all employers across the country. Now is the time for human resources personnel to start preparing for the ADA in-house—by writing and rewriting job descriptions, reviewing personnel policies and programs, and training staff in a number of areas, including recruiting and interviewing.

The ideas below will help employers make the employment process more accessible to job seekers with disabilities. They are provided by Patricia Proctor, affirmative action manager for Montgomery County, Maryland; Paul Meyer, director of EEO programs at the David Taylor Research Center (U.S. Navy) in Bethesda, Maryland; and Fritz Rumpel, director of information services for Mainstream, Inc. Located in Washington, DC, Mainstream, Inc. is a private, nonprofit organization that for years has provided technical, legal, and practical advice to employers, disabled persons, and service providers in this field.

Policies, procedures, and programs

The ADA will require top-to-bottom changes in many organizations. Depending on the size and type of your company, you should consider some of the following methods to plan for the impact of the legislation.

- Assign a human resources professional to head all activities related to individuals with disabilities—from recruiting new workers to retaining employees who become disabled on the job. This helps the organization develop cohesive and integrated policies in this area.
- Set up an on-the-job training program for persons who have disabilities.
- Develop a summer intern program for high school and college students who are disabled. This is a way for supervisors and managers to become better acquainted with disabled workers.

- Set up a data bank for applicants with disabilities. Information about job requirements, individuals' skills, and training can be matched more easily if this data is readily available.
- Set up and maintain relationships with local disability referral agencies. In addition to being a source for job applicants, staff at these groups often can be consulted if you are having problems—such as accommodation questions—with employees who are disabled.
- Recognize managers who successfully hire and promote individuals with disabilities by awarding them with plaques, featuring stories about them in the company newsletter, etc.

Guidelines for recruiting, screening, and interviewing

- Avoid "slotting": "We have a job for someone who is handicapped." Usually, these types of "handicapped jobs" are low-level, without opportunity for advancement.
- Avoid stereotyping job seekers into positions based on their disabilities: "Deaf people are ideal for jobs as printers" or "The blind are good at tuning pianos."
- Ask job-related questions such as "How would you perform this task?" Don't ask how the person became disabled or questions such as "How will you get to work?"
- Try to keep away from such thinking as "If I were disabled could I do my job?" or "If I lost my eyesight today, could I do my job?"

Tips for interacting with applicants with disabilities

- When interacting with a person who is in a wheelchair.
- If the conversation is longer than three minutes, place yourself at the same eye level as the person in the chair.
- Don't grab, push, or lean on someone's wheelchair unless requested to do so.
- Remember accessibility. Look around the human resources office and other work areas. For example, if that chair in the

middle of the room looks like it might be a barrier to a wheelchair user, move it.

When interacting with someone who is deaf:

- You may need physical signals to get the person's attention.
- If the person lip-reads, you should enunciate clearly and keep your mouth free of obstructions such as your hands. Also, when you're talking, place yourself in front of a source of light. Remember that a person who is accomplished at lipreading will fully understand only about 35 percent of what you say.
- Use gestures, facial expressions, and notes to communicate. Another option is to learn sign language.
- Please, *don't shout*.

When interacting with an applicant or employee who is blind:

- Use verbal cues; be descriptive and clear when providing directions: "The table is about five steps to your right."
- Immediately identify yourself and all others in the area. Cue handshakes verbally and/or physically.

- Describe the location of the person's chair, or place the person's hand on the back of the seat. Do not place the applicant in the chair.
- Keep doors opened *or* closed. A partially open door is a dangerous hazard for people who can't see.
- Offer traveling assistance. Let the person grasp your arm—usually just above the elbow.
- If the person uses a guide dog, avoid petting the animal.
- Please, *don't shout*.

Comment

One of the concerns human resources professionals have about interviewing applicants who have disabilities is whether or not to initiate questions about accommodations and the disability. If an applicant brings up the disability, then legally you can discuss how the person could be accommodated in the job. However, if the applicant doesn't bring up the issue, it's not clear whether you can legally inquire about accommodations. We hope and expect that questions related to this area will be cleared up by the ADA regulations. 03/2000 g

Chapter 9

Sources of Help

There are many government agencies and private organizations that are prepared to offer technical assistance and information on the various issues related to ADA compliance and individuals with disabilities. There are three types of organizations listed in this chapter: federal agencies that enforce the law, organizations throughout the country that offer support and advice to employers and job applicants, and state agencies. The groups listed in this chapter will help you get started and point you to additional sources of information.

FEDERAL ENFORCEMENT AGENCIES

Most of the federal agencies with enforcement powers have set up special offices to handle their new ADA responsibilities, and should be a key source of help. These agencies also are required to issue regulations for the particular titles that they enforce and must make available technical assistance manuals.

Covered entities with employment related questions should contact the:

Equal Employment Opportunity Commission
Review and Appeals Division
1801 L St. NW
Washington, D.C. 20507
1-800-USA-EEOC
1-800-800-3302 (TDD)

Transportation questions:

U.S. Dept of Transportation
Office of the Assistant General Counsel for
Regulation and Enforcement
400 Seventh St., SW
Washington, D.C. 20590
(202) 366-4723
(202) 755-7687 (TDD)

Architectural accessibility questions:

Architectural and Transportation Barriers
Compliance Board
1111 18th St NW, suite 501
Washington, D.C. 20036
1-800-USA-ABLE
(202) 653-7834 (TDD)

Public accommodations questions:

U.S. Dept. of Justice
Office of Americans With Disabilities
P.O. Box 66118
Washington, D.C. 20035-6118
(202) 514-0301
(202) 514-0381 (TDD)

Telecommunications questions:

Federal Communications Commission
Consumer Assistance
1919 M St. NW
Washington, D.C. 20554
(202) 632-7000
(202) 632-6999 (TDD)

NATIONWIDE ORGANIZATIONS

President's Committee on Employment of People with Disabilities.
The committee is a federal office that promotes the employment of people with disabilities

and develops and maintains a library of training and accommodations materials. It does not have enforcement responsibilities under the ADA. The committee can be reached at:

1111 20th St, NW, suite 636
Washington, D.C. 20036
(202) 653-5044
(202) 653-5050 (TDD)

Job Accommodation Network (JAN). JAN is sponsored by the President's Committee on Employment of People with Disabilities, and acts as an information clearinghouse and resource center for employers and for job applicants with disabilities. JAN can be reached at:

West Virginia University
809 Allen Hall
P.O. Box 6122
Morgantown, W.V. 26506-6122
(900)526-7234 (voice or TDD)

Mainstream, Inc. This is a private, nonprofit group that offers legal, technical, and practical advice to employers on accommodating workers with disabilities. The group can be reached at:

1030 15th St. NW, suite 1010
Washington, D.C. 20005
(202) 898-1400

STATE ORGANIZATIONS

Employers and other covered entities will also find resources available within their own states. On the following pages we provide for each of the 50 states and the District of Columbia the names and addresses of state agencies that should be good, initial sources of information. In most cases we list at least two agencies: the human or civil rights commission that enforces the state's disability discrimination laws, and the agency charged with vocational rehabilitation responsibilities. Where available, we have also listed the names and addresses of private organizations that may be helpful. Finally, there are a number of organizations—such as the American Cancer Society, the Multiple Sclerosis Society—that focus on specific disabilities and may be able to offer advice on accommodating those specific conditions. Employers and other covered entities should check the yellow pages for local chapters.



ALABAMA

STATE AGENCIES

State Department of Education
Division of Rehabilitation Services
2129 East South Blvd.
Montgomery, AL 36111
(205) 281-8780

OTHER ORGANIZATIONS

Birmingham Independent Living Center
3421 Fifth Avenue South
Birmingham, AL 35222
(800) 826-8510

*This private, non-profit group offers on-site visits for disability
modification as well as many other services.*

* * *



ALASKA

STATE AGENCIES

Division of Vocational Rehabilitation
801 West 10th Street
Goldbelt Bldg.
Juneau, AK 99811
(907) 465-2814

State Commission for Human Rights
800 A Street, Suite 202
Anchorage, AK 99501
(907) 276-7474

OTHER ORGANIZATIONS

Access Alaska
3710 Woodland Drive, Suite 900
Anchorage, AK 99517
(907) 248-4777

*This private, non-profit group provides the business community with
information and help on modification issues.*

* * *



ARKANSAS

STATE AGENCIES

Governor's Committee on Employment of the Handicapped
Division of Rehabilitation Services
300 Donaghey Plaza North, 7th and Main
Little Rock, AR 72203
(501) 682-6694

Department of Labor
1022 High Street
Little Rock, AR 72202
(501) 371-1401

OTHER ORGANIZATIONS

Mainstream Living
1501 Main Street
Little Rock, AR 72202
(501) 371-0012

This private, non-profit group offers a variety of services, including job placement and consultations for businesses that need help with accessibility issues.

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ARIZONA

STATE AGENCIES

Rehabilitation Services Administration
Department of Economic Security
1300 W. Washington St.
Phoenix, AZ 85007
(602) 542-3332

The Office of the Attorney General
Department of Law
1275 W. Washington Street
Phoenix, AZ 85007
(602) 255-5263

OTHER ORGANIZATIONS

Arizona Bridge to Independent Living
1229 East Washington St.
Phoenix, AR 85034
(602) 256-2245

This private, non-profit group offers the business community seminars on the ADA as well as on-site visits for modification of the workplace.

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CALIFORNIA

STATE AGENCIES

California Department of Rehabilitation
830 K. St. Mall, Room 214
Sacramento, CA 95814
(916) 445-3971

The California Fair Employment and Housing Commission
2000 O Street
Sacramento, CA 95814
(916) 445-9918

OTHER ORGANIZATIONS

Resources for Independent Living
1211 H. Street, Suite B
Sacramento CA 95814
(916) 446-3074

This group is a private, non-profit center that offers a wide variety of services.

Bridge to Jobs Center
420 S. Pastoria Avenue
Sunnyvale, CA 94088-0279
(408) 736-9041

The center offers job placement services as well as ADA workshops for businesses in the Santa Clara and San Mateo County areas.

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COLORADO

STATE AGENCIES

Department of Social Services
Rehabilitation Services
1575 Sherman St.
Denver, CO 80203
(303) 866-5196

The Department of Regulatory Agencies
State Services Building, Room 600C
1525 Sherman Street
Denver, CO 80203
(303) 866-2621

OTHER ORGANIZATIONS

Denver Center for Independent Living
455 Sherman St. #140
Denver, CO 80203
(303) 698-1900

This private group offers a wide variety of services. There are several other Independent Living Centers throughout the state; their numbers can be gotten from the center in Denver.

* * *



CONNECTICUT

STATE AGENCIES

Governor's Committee on Employment of People
200 Folly Brook Blvd.
Wethersfield, CT 06109
(203) 566-8061

Commission on Human Rights and Opportunities
90 Washington Street
Hartford, CT 06115
(203) 566-3350

OTHER ORGANIZATIONS

Independence Unlimited
900 Asylum Ave.
Hartford, CT 06105
(203) 549-1330

This private, non-profit group will make on-site visits to businesses that need help with accessibility issues, and offer a variety of other services as well.

* * *



DELAWARE

STATE AGENCIES

Division of Vocational Rehabilitation
321 E. 11th Street
Wilmington, DE 19801
(302) 577-2850

Department of Labor
Anti-Discrimination Section
Wilmington State Office Bldg.
820 North French Street, 6th Floor
Wilmington, DE 19801
(302) 571-2900

OTHER ORGANIZATIONS

Independent Living, Inc
818 South Broom St.
Wilmington, DE 19805
(302) 429-6693

This private, nonprofit group offers a variety of services to businesses in the area.

Easter Seals Society of Del-Mar
61 Commons Blvd.
New Castle Corporate Commons
New Castle, DE 19720. The phone number is
(302) 324-4444

The Easter Seals Society offers placement services for the disabled.

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DISTRICT OF COLUMBIA

GOVERNMENT AGENCIES

Rehabilitation Services Administration
Department of Human Services
605 East Potomac Bldg.
Washington, DC 20001
(202) 727-3227

D.C. Office of Human Rights
2000 14th St. N.W., 3rd Floor
Washington, D.C. 20009
(202) 939-8740

OTHER ORGANIZATIONS

Project LINK
1030 15th Street N.W.
Washington, DC 20005
(202) 898-0202

Project LINK is a private, nonprofit group that offers job placement and a variety of other services to employers in the area.

* * *



FLORIDA

STATE AGENCIES

Division of Vocational Rehabilitation
Department of Labor and Employment Security
1709-A Mahan Drive
Tallahassee, FL 32399-0697
(904) 488-8741

Commission on Human Relations
Bldg. F, Room 204
325 John Knox Rd.
Tallahassee, FL 323399-1570
(904) 488-7082
or
1-800-342-8170 (within Florida)

OTHER ORGANIZATIONS

Advocacy Center for Persons with Disabilities, Inc.
2661 Executive Center Circle West
Clifton Building
Koger Center
Tallahassee, FL 32301-5024
(904) 488-9070

The center provides a variety of services and information to the business community.

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GEORGIA

STATE AGENCIES

Division of Rehabilitation Services
878 Peachtree Street N.E.
Atlanta, GA 30309
(404) 894-6746

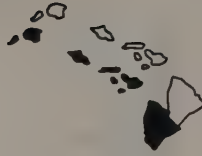
Georgia Office of Fair Employment Practices
156 Trinity Ave., S.W., Room 208
Atlanta, GA 30303
(404) 656-1736

OTHER ORGANIZATIONS

Creative Pathways, Inc.
4247 Park View Court
Stone Mountain, GA 30083
(404) 292-6501

This private organization offers a variety of services and information to businesses in the state.

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HAWAII

STATE AGENCIES

Commission on Persons with Disabilities:
5 Waterfront Plaza
500 Ala Moana Blvd.
Honolulu, HI 96813
(808) 548-7606

Dept. Of Labor and Industrial Relations
Enforcement Division
830 Punchbowl St., Room 340
Honolulu, HI 96813
(808) 548-3976

OTHER ORGANIZATIONS

Hawaii Centers for Independent Living
677 Ala Moana Blvd.
Honolulu, HI 96813
(808) 537-1941

*This private, nonprofit group offers a variety of services and information
to the business community*

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IDAHO

STATE AGENCIES

Idaho Division of Vocational Rehabilitation
650 West State Street
Len B. Jordan Building
Boise, ID 83720

Idaho Human Rights Commission
450 W. State St.
Boise, ID 83720
(208) 334-2873
(208) 334-3390

OTHER ORGANIZATIONS

LINC
1002 Shoshone St. East
Twin Falls, ID 83301
(208) 733-1712

This private, nonprofit group offers employers consulting services and is also willing to make on-site visits to employers who need help with making the workplace accessible.

Commission for the Blind
341 West Washington St.,
Boise, ID 83702.
(208) 334-3220.

This nonprofit group offers a variety of services and information on the visually disabled.

* * *



ILLINOIS

STATE AGENCIES

Department of Rehabilitation Services
623 E. Adams St.
Springfield, IL
(800) 233-DIAL

Illinois Dept. of Human Rights
One Illinois Center
100 W. Randolph St.
Chicago, IL 60601
(312) 814-6200

OTHER ORGANIZATIONS

Capitol Development Board
401 South Spring St.
Stratton Bldg.
Springfield, IL 62706
(217) 782-2864

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INDIANA

STATE AGENCIES

The Indiana Department of Human Services
Office of Vocational Rehabilitation information and services
150 West Market St.
Post Office Box 7083
Indianapolis, IN 46207-7083
(317) 232-7000

Indiana Civil Rights Commission
32 E. Washington St., Suite 900
Indianapolis, IN 46204
(317) 232-2613

OTHER ORGANIZATIONS

Indianapolis Resource Center for Independent Living
2511 East 46th Street
Indianapolis, IN 46205
(317) 541-0611

The Resource Center is a private, nonprofit group that provides job placement and counselling services.

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IOWA

STATE AGENCIES

Commission of Persons with Disabilities
Department of Human Rights
Lucas State Office Building
East 12th and Walnut Streets
Des Moines, IA 50319
(515) 281-5238

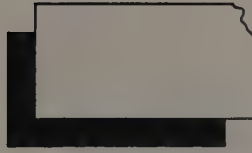
Civil Rights Commission
The Grimes State Office Building
211 E. Maple Street, 2nd Floor
Des Moines, IA 50319
(515) 281-4425
or
1-800-457-4416

OTHER ORGANIZATIONS

Work Resources
506 Locus St.
Des Moines, IA 50319
(515) 282-9675

This private, nonprofit organization will make on-site visits to employers who need help with modifying their workplace, and offers a variety of other information.

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KANSAS

STATE AGENCIES

Kansas Commission on Disability Concerns
1430 Southwest Topeka Blvd.
Topeka, KS 66612
(913) 296-1722

Commission on Civil Rights
900 S.W. Jackson, 8th floor
Suite 8518
Topeka, KN 66612
(913) 296-3206

OTHER ORGANIZATIONS

Topeka Independent Living Resources Center
3258 South Topeka Blvd.
Topeka, KS 66611
(913) 267-7100

This private, nonprofit group offer businesses information on making the workplace accessible as well as a variety of other services

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KENTUCKY

STATE AGENCIES

Office of Vocational Rehabilitation
Capital Plaza Tower
500 Mero St.
Frankfort, KY 40601
(800) 372-7172

Commission on Human Rights
Capitol Tower Plaza
500 Mero St.
Frankfort, KY 40601
(502) 564-3350

Kentucky Department for the Blind
201 Breckenridge Lane, Suite 201
Louisville, KY 40207
(502) 897-9475

This state agency provides job placement and job retention services for visually impaired people.

OTHER ORGANIZATIONS

Center for Accessible Living,
981 South 3rd Street, Suite 102,
Louisville, KY 40203.
(502) 589-6620

The center offers job training, and will also make on-site visits to employers that need help making the workplace accessible for disabled individuals.

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LOUISIANA

STATE AGENCIES

On the state level, the
Louisiana Rehabilitation Services
Department of Social Services
1755 Florida Blvd.
Post Office Box 94371
Baton Rouge, LA 70804-9371
(504) 342-9409

Commission on Human Rights
546 Main St., 2nd floor
Baton Rouge, LA 70801
(504) 342-2700

OTHER ORGANIZATIONS

Independent Living Center
320 North Carrollton Avenue
New Orleans, LA 70119
(504) 484-6400

This nonprofit group provides job training and counselling.

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MAINE

STATE AGENCIES

Bureau of Rehabilitation
Vocational Rehabilitation Program
35 Anthony Avenue
Augusta, ME
(207) 626-5300

Human Rights Commission
State House
Station No. 51
Augusta, ME 04333
(207) 289-2326

OTHER ORGANIZATIONS

Alpha one Center for Independent Living
85 East Street
S. Portland, MA 04106
(800) 640-7200

The center is a private, nonprofit group that offers a wide variety of services.

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MARYLAND

STATE AGENCIES

Governor's Committee on Employment of People with Disabilities
One Market Center
300 West Lexington St.
Baltimore, MD 21201
(301) 333-2264

Dept. of Labor and Industry
501 St. Paul Place
Baltimore, MD 21202
(301) 333-4179
or
1-800-492-6226

OTHER ORGANIZATIONS

Maryland Center for Independent Living
6305-A Sherwood Rd.
Baltimore, MD 21239-1540
(800) 423-1287

This private, nonprofit group offers on-site presentations to the business community and public forums on the ADA.

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MASSACHUSETTS

STATE AGENCIES

Massachusetts Rehabilitation Commission
27-43 Wormwood Street
Fort Point Place
Boston, MA 02210
(617) 727-2182.

Commission Against Discrimination
McCormack State Office Building, Room 601
One Ashburton Place
Boston, MA 02108
(617) 727-3990

OTHER ORGANIZATIONS

Boston Center for Independent Living
95 Berkerley St.
Boston, MA 02116
(617) 338-6665

The center is a private, nonprofit group that offers a variety of services.

Community Workshop, Inc.
174 Portland St.
Boston, MA 02114
(617) 720-2233.

This private, nonprofit group offers job placement services.

Morgan Memorial Goodwill Industries, Inc.
1010 Harrison Avenue,
Boston MA. 02119.
(617) 445-1010

This private, nonprofit group offers job placement and a variety of other services.

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MICHIGAN

STATE AGENCIES

Michigan Commission on Handicapper Concerns
P.O. Box 30015
Lansing, MI 48909
(800) SAY-ABLE

Dept. of Civil Rights
303 W. Kalamazoo, 4th floor
Lansing, MI 48913
(517) 334-6079

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MINNESOTA

STATE AGENCIES

State Council on Disability
145 Metro Square Bldg.
7th Place and Jackson St.
St. Paul, MN 55101
(612) 296-6785

Dept. of Human Rights
7th Place and Robert St.
St. Paul, MN 55101
(612) 296-5663

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MISSISSIPPI

STATE AGENCIES

Division of
Vocational Rehabilitation Client Placement Information Office
932 N. State St.
Jackson, MS 39201
(800) 443-1000

Employment Security Commission
1520 West Capitol
P.O. Box 1699
Jackson, MS 39205
(601) 354-8711

OTHER ORGANIZATIONS

Center for Independent Living
300 Capers Avenue
Jackson, MS 39203
(601) 961-4140

The center is a nonprofit agency that offers a variety of information

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MISSOURI

STATE AGENCIES

Governor's Committee on Employment of People with Disabilities
3315 West Truman Blvd.
Jefferson City, MO 65109
(800) 877-8249

Commission on Human rights
315 Ellis Blvd.
P.O. Box 1129
Jefferson City, MO 65102
(314) 751-3325

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MONTANA

STATE AGENCIES

Montana State Department of Social and Rehabilitation Services
Rehabilitation Services and Visual Services Division

111 Sanders
Post Office Box 4210
Helena, Mt 59604
(406) 444-2590

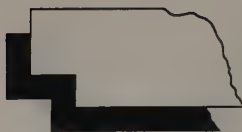
Human Rights Commission
Room C-317 Cogswell Bldg.
Capitol Station
Box 1728
Helena, MT 59624
(406) 444-2884

OTHER ORGANIZATIONS

Montana Independent Living Project
38 South Last Chance Gulch
Helena, MT 59604
(406) 442-5755

This nonprofit center provides the business community with a range of information, including advice on making the workplace accessible for employees with disabilities.

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NEBRASKA

STATE AGENCIES

Governor's Committee for People with Disabilities
550 S. 16th Street
Lincoln, NE 94600
(800) 742-7594

Nebraska Equal Opportunity Commission
P.O. Box 94934
301 Centennial Mall, South
Lincoln, NE 68509
(402) 471-2024

OTHER ORGANIZATIONS

League for Human Dignity
1701 P. Street
Lincoln, NE 68508
(402) 471-7871

This is a private, nonprofit group that will make on site visits to employers who need help with accessibility issues.

Goodwill Industries of Lincoln
5001 South 16th Street
Lincoln, NE 68512
(402) 421-2022

This is a nonprofit group that offer job placement and a variety of other services to area businesses.

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NEVADA

STATE AGENCIES

Nevada Rehabilitation Division
Planning, Research and Program Development
505 E. King Street
Kinhead Building
Carson City, NE 89710
(702) 687-4452

Nevada Equal Rights Commission
1515 E. Tropicana, Suite 590
Las Vegas, NV 89158
(702) 486-7161

OTHER ORGANIZATIONS

Northern Nevada Center for Independent Living
624 East 4th Street
Reno, NE 89512
(702) 328-8000

This private, nonprofit group offers modification advice to businesses as well as a variety of other services.

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NEW HAMPSHIRE

STATE AGENCIES

Governor's Commission on Disability
57 Regional Drive
Concord, NH 03301
(800) 852-3405

Commission for Human Rights
163 Loudon Rd.
Concord, NH 03301
(603) 271-2767

OTHER ORGANIZATIONS

Granite State Independent Living Foundation
172 Pembroke Road
Concord, NH 03301
(603) 228-9680

This private, nonprofit group offers a wide variety of information and services for the business community.

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NEW JERSEY

STATE AGENCIES

Division of Vocational Rehabilitation Services
Department of Labor
Labor and Industry Building
Room 1005
Trenton, NJ 08625
(609) 292-5987

Division on Civil Rights
The Department of Law and Safety
1100 Raymond Boulevard
Newark, NJ 07102
(201) 648-2700

OTHER ORGANIZATIONS

New Jersey Business and Rehabilitation Alliance
100 Village Blvd.
Princeton, NJ. 08540
(609) 243-9388

This private, nonprofit group offers consulting services to businesses on a range of disability related issues.

Easter Seals Society of New Jersey
32 Ford Ave.
Milltown, NJ 08850
(908) 247-8353

The Easter Seals Society provides job placement and also offers the business community a number of other services.

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NEW MEXICO

STATE AGENCIES

Governor's Committee on the Concerns for the Handicapped
491 Old Santa Fe Trail
Lamy Building
Santa Fe, NM 87503
(505) 827-6465

Department of Labor
Education Bureau
Human Rights Division
1596 Pacheco
Santa Fe, NM 87502
(505) 827-6838

OTHER ORGANIZATIONS

New Vistas.
1121 Alto Street
Post Office Box 2364
Santa Fe, NM 87504

This private, nonprofit group offers a variety of services to the business community.

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NEW YORK

STATE AGENCIES

New York State Education Department
Office of Vocational and Educational Services
for Individuals with Disabilities
One Commerce Plaza
Albany, NY 12234
(800) 222-JOBS

State Division of Human Rights
55 W. 125th St.
New York, NY 10027
(212) 870-8790

OTHER ORGANIZATIONS

Human Resources Center
201 I.U. Willets Rd.
W. Albertson, NY 11507
(516) 747-5400

This private, nonprofit group provides businesses with information on making the workplace barrier free and complying with other aspects of the ADA.

International Center for the Disabled
340 East 24th Street
New York, NY 10010
(212) 679-0100

This private, nonprofit group offers employers training and counselling on various aspects of the ADA, as well as job placement services.

Federation of the Handicapped
211 West 4th Street
New York, NY.10011
(212) 206-4200

This private, nonprofit group offers placement services and will make on-site visits to help employers modify their workplaces.

Employment Program for Recovered Alcoholics, Inc.
225 West 34th Street
New York, NY 10122
(212) 947-1471

The program offers job placement for recovered alcoholics.

Independent Living Programs

In addition, throughout New York City and State, there are 34 Independent Living Programs, each offering counselling and awareness services to the business community as well as a variety of other services. One of the centers is located in Rochester and the number is (716) 271-4950.

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NORTH CAROLINA

STATE AGENCIES

Governor's Advocacy Council for Persons with Disabilities
1318 Dale St.
Suite 100
Raleigh, NC 27605-1275
(800) 821-6922

Human Relations Council
116 W. Jones St.
Administration Bldg.
Raleigh, NC 27611
(919) 733-7996

OTHER ORGANIZATIONS

Programs for Accessible Living
1012 South Kings Drive
Suite G-7
Charlotte, NC 28283
(704) 375-3977

This private, nonprofit group provides businesses with help in making the workplace accessible for individuals with disabilities.

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NORTH DAKOTA

STATE AGENCIES

Office of Vocational Rehabilitation
Department of Human Services
State Capitol Building
Bismark, ND 58505
(701) 224-2907

Department of Labor
State Capitol, 5th floor
Bismark, ND 58505
(701) 224-2660

OTHER ORGANIZATIONS

Center for Independent Living
1007 18th Street N.W.
Mandam, ND 58554
(701) 663-0376

The center is a private, nonprofit group that provides the business community with a range of information.

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OHIO

STATE AGENCIES

Ohio Rehabilitation Services Commission
400 East Campus View Blvd.
Columbus, OH 43235-4604
(614) 438-1210

Civil Rights Commission
220 Parsons Ave.
Columbus, OH 43266
(614) 466-7637

OTHER ORGANIZATIONS

Services for Independent Living
25100 Euclid Avenue
Cleveland, OH 44117
(216) 731-1529

This private, nonprofit group provides job counselling and will make on-site visits to help employers with accessibility issues.

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OKLAHOMA

STATE AGENCIES

Governor's Office of Handicapped Concerns
4300 North Lincoln Blvd.
Oklahoma City, OK 73105
(405) 521-3756

Oklahoma Human Rights Commission
Room 480
2102 N. Lincoln Blvd.
Oklahoma City, OK 73105
(405) 521-2360

OTHER ORGANIZATIONS

National Clearing House of Rehabilitation Training Materials
Oklahoma State University
816 West 6th Street
Stillwater, OK 74078
(405) 624-7650

The clearing house offers placement services as well as counselling for employers that have disabled employees with special needs.

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OREGON

STATE AGENCIES

Oregon Disability Commission
1880 Lancaster Drive N.E., Suite 106
Salem, OR 97310
(503) 378-3142

Civil Rights Division
State Office Bldg.
1400 SW 5th Ave.
Portland, OR 97201
(503) 229-5900

OTHER ORGANIZATIONS

Access Oregon
2600 Southeast Belmont St.
Portland, OR 97214
(503) 230-1225

This private, non-profit group will make on-site visits to employers who need help with making the workplace accessible.

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PENNSYLVANIA

STATE AGENCIES

Division of Vocational Rehabilitation
Dept. of Labor and Industry
Labor and Industry Bldg, Room 1300
7th and Forster Streets
Harrisburg, PA 17120
(717) 787-5244

Human Relations Commission
101 S. Second St.
Harrisburg, PA 17101
(717) 787-4410

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RHODE ISLAND

STATE AGENCIES

Rhode Island Vocational Rehabilitation
40 Fountain Street
Providence, RI 02903
(401) 421-7005

Commission for Human Rights
10 Abbott Park Place
Providence, RI 02903
(401) 277-2661

OTHER ORGANIZATIONS

People Achieving Real Independence (PARI)
500 Prospect Street
Pawtucket, RI 02860
(401) 725-1966

This private, nonprofit group offers job placement services and a variety of other services.

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SOUTH CAROLINA

STATE AGENCIES

Vocational Rehabilitation Department
1410 Boston Avenue
Post Office Box 15
West Columbia, SC 29171-0015
(803) 822-430

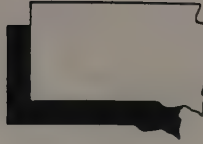
Human Affairs Commission
Richard Bldg.
2611 Forest Drive
P.O. Box 11009
Columbia, SC 29211
(803) 737-6580

OTHER ORGANIZATIONS

The Center for Developmental Disabilities
Benson Building
University of South Carolina
Columbia, SC 29208
(800) 922-1107

This private, nonprofit group offers job counselling and will make on-site visits to help employers with workplace modification.

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SOUTH DAKOTA

STATE AGENCIES

Department of Vocational Rehabilitation
700 Governors Drive
Richard F. Kneip Building
Pierre, SD 57501
(605) 773-3195

Division of Human Rights
500 East Capitol
Pierre, SD 57501
(605) 773-4493

OTHER ORGANIZATIONS

Prairie Freedom Center for Disabled Independence
301 S. Garfield
Sioux Falls, SD 57104
(605) 339-6558

This private, nonprofit group offers a variety of services to businesses including help with renovations and other accessibility issues.

* * *



TENNESSEE

STATE AGENCIES

Division of Rehabilitation Services
Department of Human Services
Citizens Plaza Building
400 Deaderick Street
Nashville, TN 37219
(615) 741-2019

Human Rights Commission
Capitol Boulevard Bldg.
226 Capitol Boulevard
Nashville, TN 37219-5095
(615) 741-5825

OTHER ORGANIZATIONS

Effective Advocacy for Citizens with Handicaps, Inc.
2416 21st Avenue S.
Nashville, TN 37212
(800) 342-1660

This nonprofit group offers job placement and other services.

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TEXAS

STATE AGENCIES

Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, TX 78751-2316
(512) 483-4761

Texas Human Rights Commission
John H. Winters Human Services Bldg.
P.O. Box 2960
Austin, TX 78765
(512) 450-3040

OTHER ORGANIZATIONS

Project LINK
717 North Harwood Street
Dallas, TX 75201
(214) 969-0118

Project LINK is a private, nonprofit agency that offers a variety of services including job placement.

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UTAH

STATE AGENCIES

Utah State Office of Rehabilitation
250 East 500 South
Salt Lake City, UT 84111
(801) 538-7530

Industrial Commission
Anti-Discriminaiton Division
160 E.3rd St. South
P.O. Box 510910
Salt Lake City, UT 84151
(801) 530-6801

OTHER ORGANIZATIONS

Utah Independent Living Center
764 South 200 West
Salt Lake City, UT 84101-2700
(801) 359-2457

This private, nonprofit group offers information to the business community on modifying the workplace and provides a variety of other services.

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VERMONT

STATE AGENCIES

Division of Vocational Rehabilitation
103 S. Main St.
Waterbury, VT 05676
(802) 241-2186

Attorney General of Vermont
Civil Rights Division
Pavilion Office Bldg.
109 State St.
Montpelier, VT 05602
(802) 828-3171

OTHER ORGANIZATIONS

Vermont Center for Independent Living
174 River Street
Montpelier, VT 05602
(802) 229-0501

This private, nonprofit center offers a variety of services and will make on-site visits to help businesses make their workplaces accessible.

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VIRGINIA

STATE AGENCIES

Department for Rights of Virginians with Disabilities
101 North 14th Street
James Monroe Building
Richmond, VA 23219
(804) 225-2042

Office of Civil Rights
Dept. of Social Services
Nelson Bldg.
1503 Santa Rosa Rd.
Richmond, VA 23288
(804) 662-9971

Dept. of Labor and Industry
P.O. Box 12064
Richmond, VA 23241
(804) 786-2376

OTHER ORGANIZATIONS

Independence Center of Northern Virginia, Inc.
2111 Wilson Blvd.
Suite 400,
Arlington, VA 22201
(703) 525-3268

This private, nonprofit center offers free on-site inspections to help employers make their workplaces accessible, and provides other services as well.

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WASHINGTON

STATE AGENCIES

Division of Vocational Rehabilitation
Department of Social and Health Services
12th and Franklin St.
Olympia, WA 98504
(206) 753-5473

State Human Rights Commission
Evergreen Plaza Bldg.
711 South Capitol Way
Mail Stop FJ-41
Olympia, WA 98504-3341
(206) 753-6770/2558

OTHER ORGANIZATIONS

Washington Vocational Services
22316 70th Ave. West
Mount Lake Terrace, Washington 98043
(206) 774-3338

This private, nonprofit group provides job placement services and will make on-site visits to help employers make their workplaces accessible.

Morningside
2611 14th Avenue N.W.
Post Office Box 1937
Olympia, WA 98502
(206) 943-0512

Morningside offers the business community advice and information on the ADA, as well as job placement services

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WEST VIRGINIA

STATE AGENCIES

Division of Rehabilitation Services
Program and Planning Building
West Virginia Rehabilitation Center
Institute, WV 25112
(304) 766-4601

Human Rights Commission
1036 Quarrier St.
215 Profession Bldg.
Charleston, WV 25301
(304) 348-2616

OTHER ORGANIZATIONS

Mountain State Center for Independent Living
914 1/2 5th Avenue
Huntington, WV 25701
(304) 525-3324

This private, nonprofit group offers a variety of services and will make on-site visits to help employers make their workplaces accessible.

* * *



WISCONSIN

STATE AGENCIES

Governor's Committee for People with Disabilities
131 West Wilson Street
Madison, WI 53704
(608) 266-5378

Equal Rights Division
201 E. Washington Ave.
P.O. Box 8928
Madison, WI 53708
(608) 266-6860

OTHER ORGANIZATIONS

Projects with Industries
Stout Vocational Rehabilitation Institute
School of Education and Human Services
University of Wisconsin—Stout
Menomonies, WI 54751
(800) 535-6288

This private, nonprofit group offers job placement services as well as job training for individuals with disabilities.

Center for Independent Living
6222 West Capitol Drive
Milwaukee, WI 53216
(414) 438-5622

This private, nonprofit group offers the business community a variety of services.

* * *



WYOMING

STATE AGENCIES

Division of Vocational Rehabilitation
Herschler Building
Cheyenne, WY 82002
(307) 777-7389

Fair Employment Commisison
Hathaway Bldg.
Cheyenne, WY 82002
(307) 777-7261

OTHER ORGANIZATIONS

Wyoming Independent Living and Rehabilitation Services
246 South Center
Casper, WY 82601
(307) 266-6956

This nonprofit group offers a variety of services to the business community.

* * *

Appendix A

State Requirements

Most states and Washington, D.C. have their own laws prohibiting employment practices that discriminate on the basis of disability. The ADA specifies that it does not preempt these laws if they offer equal or greater protection, so for employers who are subject to both state law and the ADA, it means that they must comply with whichever law offers the greater protection to individuals with disabilities.

On the following pages we have included summaries of those state laws, as well as a summary of the federal (national) antidiscrimination laws. If an employer's state law and the ADA differ, it most likely will be in one of the following areas:

Alcohol and drugs: Some state laws regard current drug users as being disabled and therefore protects them; the ADA does not.

AIDS: Some states do not protect individuals with AIDS or HIV virus; the ADA does.

Physical examinations: Some states permit employers to give a pre-employment physical at any time; the ADA permits a physical only after a job offer has been made and only if all applicants for that job category are given a physical.

Pre-employment inquiries: Some states permit employers to ask an applicant directly whether he or she has a disability; the ADA lets an employer ask only whether the applicant can perform the job duties in question.

ALABAMA

SUMMARY

Alabama law prohibits state and local governments, public schools, and other employers supported in whole or in part by public funds from discriminating in their employment practices on the basis of physical disability (AL Code Sec. 21-7-8).

Private employers. Alabama state law does not specifically cover private employers in the area of disability discrimination, but employers may have obligations under the federal **Americans with Disabilities Act** or the federal **Rehabilitation Act**. For details, see the NATIONAL section.

ALASKA

SUMMARY

The **Alaska Human Rights Law** prohibits discrimination in employment against qualified handicapped individuals where the reasonable requirements of the job do not require handicap-related distinctions (AK Stat. Sec. 18.80.010, *et seq.*). The law applies to *all* employers in the state.

Handicapped defined. Handicapped individuals are those:

- With physical or mental impairments that substantially limit one or more major life activities
- With a history or record of such impairments
- Treated or perceived as having such impairments.

Reasonable accommodation. The law requires that employers reasonably accommodate the known physical or mental limitations of a qualified handicapped employee, unless to do so would impose an undue business hardship.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a current or past history of drug or alcohol dependency may be protected under the Human Rights Law, if they can:

- Establish, through medical verification, that their dependency constitutes a physical impairment
- Satisfactorily perform the job with reasonable accommodation.

Such accommodation usually means allowing time off for treatment and rehabilitation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a chronic physical disability under the Human Rights Law.

ENFORCEMENT

The Alaska Commission for Human Rights enforces the Human Rights Law. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Obtain a court order for the enforcement of its orders.

FURTHER INFORMATION

For further information, contact:

State Commission for Human Rights
800 A Street, Suite 202
Anchorage, AK 99501
(907) 276-7474

SUMMARY

The Arizona Civil Rights Act prohibits employment practices that discriminate on the basis of handicap or disability. The Act defines handicap as a physical impairment that substantially restricts or limits an individual's general ability to secure, retain, or advance in employment (Ariz. Rev. Stat. Ann. Sec. 41-1463). The Act covers employers with 15 or more employees. An executive order also prohibits discrimination by state agencies on the basis of disability status (Executive Order No. 83-5).

Alcohol and drugs. The Act specifically excludes any impairment caused by current or recent use of alcohol or drugs.

AIDS. The state attorney general has said that AIDS falls within the definition of handicapped (Attorney General Opinion, 12/14/87).

REASONABLE ACCOMMODATION

The Act requires employers to reasonably accommodate handicapped applicants and employees. Reasonable accommodation is defined as an accommodation that does not:

- Unduly disrupt or interfere with the employer's normal operations
- Threaten the health or safety of the handicapped individual or others
- Contradict a business necessity of the employer
- Impose undue hardship on the employer, based on the size and type of the business, the financial resources of the employer, and the estimated cost and extent of the accommodation.

PERMISSIBLE PRACTICES

A disabled individual must meet certain conditions to be protected under the Act. An employer may take action otherwise prohibited if the individual does not provide the employer with the following information:

- That the individual has an impairment or condition that constitutes a handicap within the meaning of the Act
- About the general nature of the disability and any resulting limitations or restrictions
- A release permitting the employer to contact physicians, counselors, and any other persons who can provide additional information about the disability and the names of those persons.

An employer may also:

- Act pursuant to a bona fide seniority or merit system or a system that measures earnings by quantity or quality of production, provided that the systems are not the result of an intention to discriminate because of handicap
- Give and act upon professionally developed ability tests provided that the test is not the result of an intention to discriminate on the basis of handicap.

ENFORCEMENT

The Arizona Civil Rights Division enforces the Act, and can be contacted at:

The Office of the Attorney General
Department of Law
1275 W. Washington Street
Phoenix, AZ 85007
(602) 255-5263

ARKANSAS

SUMMARY

Arkansas has no comprehensive fair employment law covering private employers. Employers in the state are covered, where applicable, by federal laws on handicap discrimination. For further details, refer to the NATIONAL section.

PUBLIC EMPLOYMENT

It is illegal to discriminate against handicapped persons in public employment, including public schools, and in any employment supported by state funds (AR Stat. Ann. Sec. 82-2901). Handicapped persons include those with visual or hearing impairments or other handicaps who can otherwise perform the job.

FURTHER INFORMATION

For further information on Arkansas law, contact:

Department of Labor
1022 High Street
Little Rock, AR 72202
(501) 371-1401

SUMMARY

The **California Fair Employment and Housing Act** prohibits employment practices that discriminate on the basis of physical disability or medical condition, unless the condition prevents satisfactory job performance. The Act covers employers with five or more employees (CA Gov't Code Sec. 12940).

Definitions. A *handicapped individual* is one who has a physical handicap or medical condition that substantially limits one or more major life activities, has a history of such a condition, or is regarded by others as having such a condition.

The term *physical handicap* includes sight, speech, or hearing impairments, or any other impairment that would require special education or related services. *Medical condition* means any health impairment associated with a diagnosis of cancer for which a person has been rehabilitated or cured.

REASONABLE ACCOMMODATION

The law requires that employers make reasonable accommodation for the needs of disabled individuals unless to do so would create an undue business hardship. Reasonable accommodation includes such measures as making facilities more accessible and job restructuring, but need not include structural alterations of the building or grounds, unless otherwise required by federal or state law or regulation.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Alcoholism and drug abuse are excluded as physical disabilities under the Act. However, the state has rehabilitation laws that require all employers having 25 or more employees to reasonably accommodate addicted employees by allowing an unpaid leave of absence to enter and participate in a rehabilitation program.

Acquired Immune Deficiency Syndrome (AIDS). The California Fair Employment and Housing Commission has taken the position that AIDS is a physical handicap under the Act.

Smoke allergies. According to the Commission, sensitivity or allergy to smoke can constitute a physical handicap.

PHYSICAL EXAMINATIONS

Under California law, pre-employment physical examinations are lawful if:

- An offer of employment has been made
- When the results of the examination would result in disqualification, the applicant is entitled to submit independent medical opinions for consideration
- Exams are uniformly required of all applicants
- The results are kept separately and accorded confidentiality as medical records, except to the extent that supervisors and other personnel need to be informed for reasons of accommodation and safety.

ENFORCEMENT

The California Fair Employment and Housing Commission enforces the Act, and can be contacted at:

2000 O Street
Sacramento, CA 95814
(916) 445-9918

SUMMARY

The **Colorado Anti-Discrimination Act** prohibits employment practices that discriminate on the basis of disability, provided the disability does not prevent performance of basic job duties (CO Rev. Stat. Sec. 24-34-401, *et seq.*). The Act covers *all* employers regardless of size. Separate laws also cover state agencies and employers supported in whole or in part by public funds.

Disability defined. Disabled individuals are those who:

- Have a physical impairment that substantially limits one or more major life activities
- Have a record of such an impairment
- Are regarded by others as having such an impairment.

REASONABLE ACCOMMODATION

The law requires employers to reasonably accommodate an individual's known disabilities unless to do so would cause the employer undue hardship. Accommodations could include making facilities accessible to disabled persons, restructuring jobs, and modifying equipment. However, the law does *not* require employers to incur additional expenses.

SPECIFIC DISABILITIES

Drug and alcohol addiction. Individuals with a current or past history of drug or alcohol dependency may be protected under the discrimination law, provided that they can:

- Establish that their dependency constitutes a physical impairment
- Satisfactorily perform the job with reasonable accommodation.

Such accommodation usually means allowing time off for treatment and rehabilitation.

Acquired Immune Deficiency Syndrome (AIDS). The Colorado Civil Rights Commission has taken the position that AIDS is a protected handicap.

PRE-EMPLOYMENT INQUIRIES

Colorado law allows employers to ask only whether the applicant can perform the job duties in question. An employer may *not* ask whether an applicant is disabled, or about the nature or severity of any handicap.

ENFORCEMENT

The Colorado Civil Rights Commission enforces the Act, and can be contacted at:

The Department of Regulatory Agencies
State Services Building, Room 600C
1525 Sherman Street
Denver, CO 80203
(303) 866-2621

CONNECTICUT

SUMMARY

The **Connecticut Fair Employment Practices Act** prohibits discrimination in employment on the basis of present or past history of mental disorder, mental retardation, or physical disability, including blindness (CT Gen. Stat. Sec. 46a-51, *et seq.*). The law applies to employers with three or more employees.

Qualified handicapped individuals. Handicapped individuals must be qualified to perform the essential functions of the job, despite any handicap.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Drug addiction and alcoholism. Individuals with a present condition or past history of substance abuse or addiction may be protected under the law.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap.

ENFORCEMENT

The Connecticut Commission on Human Rights and Opportunities enforces the Fair Employment Practices Act. The Commission has the authority to accept complaints, conduct hearings, issue orders, and, if necessary, seek court action for compliance.

FURTHER INFORMATION

For further information, contact:

Commission on Human Rights and Opportunities
90 Washington Street
Hartford, CT 06115
(203) 566-3350

SUMMARY

The **Delaware Fair Employment Practices Act** prohibits discrimination in employment on the basis of a handicap (DE Code Ann. Tit. 19, Sec. 720, *et seq.*). The law applies to employers with 20 or more employees.

Handicapped defined. Handicapped individuals are those:

- With a physical or mental impairment that substantially limits one or more major life activities
- With a record of such an impairment
- Regarded as having such an impairment.

"Qualified handicapped individual." Employers are only required to hire or retain a handicapped individual who, with or without reasonable accommodation, can satisfactorily perform the essential functions of the job in question.

Exclusion. The law specifically *excludes* from protection alcoholics or drug abusers whose current use of alcohol or drugs renders them:

- Unable to satisfactorily perform the job in question
- A direct threat to the property or safety of others in the workplace.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental impairments of a qualified handicapped employee, unless to do so would impose an undue business hardship. Such accommodation may mean making facilities more accessible, modifying equipment, providing mechanical aids, or changing schedules or duties. Reasonable accommodation does not mean that employers must make accommodations of a personal nature (e.g., eyeglasses, hearing aids), except to the extent that such items are generally made available to all employees, nor does it mean that employers must reassign duties in a manner unfair to other employees.

Undue business hardship. Adjustments or accommodations costing less than five percent of an employee's salary or annualized wage are *not* considered to impose an undue hardship.

Reasonable accommodation duties. A qualified handicapped person who requests reasonable accommodation to secure employment must: (1) inform the employer of the handicap, (2) submit any necessary medical documentation, (3) suggest any known methods of accommodation, and (4) cooperate with the employer in determining possible accommodation.

ENFORCEMENT

The Department of Labor enforces the Fair Employment Practices Act. The Department has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

FURTHER INFORMATION

For further information, contact:

Department of Labor
Anti-Discrimination Section
Wilmington State Office Bldg.
820 North French Street, 6th Floor
Wilmington, DE 19801
(302) 571-2900

DISTRICT OF COLUMBIA

SUMMARY

The **District of Columbia Human Rights Act** prohibits discrimination in employment on the basis of physical handicap (D.C. Code Ann. Sec. 1-2501, *et seq.*). The law applies to *all* employers in the District. It protects individuals with a handicap, as well as those with a record of, or who are regarded as, having a handicap.

Handicap defined. A handicap is defined as "a bodily or mental disablement which may be the result of injury, illness, or congenital condition which does not preclude the capacity to perform a particular job and for which reasonable accommodation can be made."

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Drug addiction and alcoholism. Drug addiction and alcoholism are protected as handicaps under the law, provided that the individual can perform the duties of the job in question with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is a protected handicap under District law.

ENFORCEMENT

The District of Columbia Office of Human Rights administers and enforces the Act. The Office has the authority to receive, investigate, and make determinations regarding discrimination complaints, and issue orders enforceable in a District court.

FURTHER INFORMATION

For further information, contact:

D.C. Office of Human Rights
2000 14th St. N.W., 3rd Floor
Washington, D.C. 20009
(202) 939-8740

FLORIDA

SUMMARY

The **Florida Human Rights Act** prohibits employment practices that discriminate on the basis of disability. The Act covers employers with 15 or more employees (FL Stat. Ann. Sec. 760.01, *et seq.*). Separate laws also cover public employers.

Acquired Immune Deficiency Syndrome (AIDS). Florida has a comprehensive AIDS law that prohibits employment practices that discriminate against individuals who have AIDS or an AIDS-related virus. The law covers *all* employers.

Sickle-cell trait. Florida also prohibits discrimination against a person who has the sickle cell trait. The law covers *all* employers.

ENFORCEMENT

The Florida Commission on Human Relations enforces the Act, and can be contacted at:

Building F, Room 204
325 John Knox Road
Tallahassee, FL 32399-1570
(904) 488-7082
or
1-800-342-8170 (within Florida)

GEORGIA

SUMMARY

The **Georgia Equal Employment for the Handicapped Law** prohibits employment practices that discriminate on the basis of physical or mental handicap, unless the disability prevents satisfactory job performance. The Law covers employers with 15 or more employees (GA Code Ann. Sec. 66-501, *et seq.*).

State agencies. The **Georgia Fair Employment Practices Act** prohibits employment practices that discriminate on the basis of physical or mental impairment. The Act covers state agencies with 15 or more employees (GA Code Ann. Sec. 89-1703).

Handicapped individual defined. Under Georgia law, a handicapped individual means any person who has a physical or mental impairment that substantially limits one or more major life activities or who has a record of such an impairment.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate a disabled individual, provided the accommodation does not cause the employer undue hardship. The law does not require employers to modify existing facilities or grounds in any way or to exercise a higher degree of caution for handicapped than for nonhandicapped individuals.

SPECIFIC EXCLUSIONS

Alcohol and drugs. The definition of "handicapped individual" specifically excludes any one addicted to drugs or alcohol.

Communicable diseases. The Act also excludes communicable diseases.

PRE-EMPLOYMENT INQUIRIES

Georgia law allows employers to ask about disabilities that directly relate to an individual's ability to perform the job in question, and to ask about treatment, medication, appliances, or other types of rehabilitation.

ENFORCEMENT

The Georgia Office of Fair Employment Practices enforces the discrimination laws, and can be contacted at:

156 Trinity Avenue, SW, Room 208
Atlanta, GA 30303
(404) 656-1736

HAWAII

STATE LAW

The **Hawaii Fair Employment Practice Law** prohibits discrimination in employment against qualified handicapped individuals (Hawaii Rev. Stat. Sec. 378-1, *et seq.*). The law applies to *all* employers in the state.

Handicapped defined. Handicapped individuals are those:

- With physical or mental impairments that substantially limit one or more major life activities
- With a history or record of such impairments
- Treated or perceived as having such impairments.

Reasonable accommodation. The law requires that employers reasonably accommodate the known physical or mental limitations of a qualified handicapped employee, unless to do so would impose an undue business hardship. Such accommodation does *not* require unreasonable structural changes or expensive equipment alterations.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a past history of drug or alcohol dependency or a current abuse problem may be protected under the Fair Employment Practice Law, provided that they can:

- Establish that their dependency constitutes a physical impairment
- Satisfactorily perform the job with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a physical handicap under the law.

ENFORCEMENT

The Hawaii Department of Labor and Industrial Relations enforces the Fair Employment Practice Law. The Department has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

FURTHER INFORMATION

For further information, contact:

Department of Labor and Industrial Relations
Enforcement Division
830 Punchbowl Street, Room 340
Honolulu, Hawaii 96813
(808) 548-3976

SUMMARY

The **Idaho Fair Employment Practices Act** prohibits discrimination in employment on the basis of a handicap (ID Code Sec. 67-5901, *et seq.*). The law applies to employers with 10 or more employees.

Handicapped defined. Handicapped individuals are those:

- With a physical or mental condition that constitutes a substantial disability, which can be medically verified
- With a record of such a disability
- Regarded as having such a disability.

Exception. Employers are *not* required to hire or retain a handicapped individual who, even with reasonable accommodation by the employer, is not able to satisfactorily perform the job in question.

Reasonable accommodation. The law requires that employers reasonably accommodate the known physical or mental disabilities of a qualified handicapped employee, unless to do so would impose an undue business hardship. Reasonable accommodation does not mean that employers must make adjustments that unduly disrupt or interfere with normal business operations, or that threaten the health or safety of the handicapped person or others.

Undue business hardship. In assessing undue hardship, among the factors considered are the size and type of business, the employer's financial resources, and the estimated cost and extent of the adjustment.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a past history of drug or alcohol dependency or a current abuse problem may be protected under the Fair Employment Practices Act, provided that they can:

- Establish that their dependency constitutes a physical or mental disability
- Satisfactorily perform the job with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap under the law.

ENFORCEMENT

The Idaho Human Rights Commission enforces the Fair Employment Practices Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

FURTHER INFORMATION

For further information, contact:

Idaho Human Rights Commission
450 W. State Street
Boise, ID 83720
(208) 334-2873

DISCRIMINATION

The **Illinois Human Rights Act** prohibits employment practices that discriminate on the basis of handicap or disability. The handicap provisions of the law cover *all* employers, regardless of size (IL Rev. Stat. Ch. 68, Secs. 1-101, *et seq.*). Separate laws also cover state agencies, public contractors, and any employer supported in whole or in part by public funds.

Disability defined. A disabled individual is one who has a determinable physical or mental characteristic that is unrelated to the ability to perform the job in question. The definition also includes individuals who have a record of such a characteristic, or are regarded by others as having such a characteristic.

Reasonable accommodation. Employers are required to reasonably accommodate the known disabilities of otherwise qualified applicants, unless to do so would be prohibitively expensive or seriously disrupt the ordinary course of business.

PRE-EMPLOYMENT INQUIRIES

According to interpretive rules issued by the Illinois Human Rights Commission, an employer may ask applicants whether they have any mental or physical disability that would impair job performance.

ENFORCEMENT

The Illinois Department of Human Rights enforces the Act, and can be contacted at:
One Illinois Center, Room 10-100
100 W. Randolph Street
Chicago, IL 60601
(312) 814-6200

SUMMARY

The **Indiana Civil Rights Act** prohibits employment practices that discriminate on the basis of handicap or disability. The Act covers employers with six or more employees (IN Code Ann. Sec. 22-9-1-1, *et seq.*).

Handicap defined. A handicapped or disabled individual is one who has a physical or mental condition that constitutes a "substantial disability" and is unrelated to the individual's ability to engage in a particular occupation.

REASONABLE ACCOMMODATION

The Act requires employers to reasonably accommodate an individual's disability, but that does not include physical modifications.

ENFORCEMENT

The Indiana Civil Rights Commission enforces the Act, and can be contacted at:

32 E. Washington Street, Suite 900
Indianapolis, IN 46204
(317) 232-2613

STATE LAW

The **Iowa Civil Rights Act** prohibits employment practices that discriminate against qualified disabled persons, i.e., individuals who can satisfactorily perform the job in question with reasonable accommodation (IA Code Sec. 601A.1, *et seq.*). The Act covers *all* employers.

Public employers. A separate law also prohibits all employers supported in whole or in part by public funds from discriminating in employment on the basis of handicaps, including blindness (IA Code Sec. 601D.2).

Handicapped defined. Handicapped individuals are those:

- With physical or mental impairments that substantially limit one or more major life activities
- With a history or record of such impairments
- Treated or perceived as having such impairments.

Reasonable accommodation. The law requires that employers reasonably accommodate the known physical or mental limitations of a qualified disabled employee, unless to do so would impose an undue business hardship.

Such accommodation may include physical changes in the facilities, modifying equipment, or restructuring the job.

Factors that might be considered in determining undue hardship include the size and type of the employer's business and the nature and cost of the accommodation required.

Bona fide occupational qualification (BFOQ) exception. Differences in treatment are permissible where an individual cannot meet one of the BFOQs for the position in question. Such situations are rare, however, and employers should be cautious in relying on this when making employment decisions.

SPECIFIC HANDICAPS

Drug and alcohol addiction. An individual with a current or past history of drug or alcohol dependency may be protected under the handicap discrimination law, provided of course, that the person can satisfactorily perform the job with reasonable accommodation. Such accommodation usually means allowing time off for treatment and rehabilitation.

Acquired Immune Deficiency Syndrome (AIDS). The Iowa Civil Rights Commission will accept and investigate AIDS-related discrimination complaints.

PRE-EMPLOYMENT INQUIRIES

Employers may make pre-employment inquiries about an applicant's physical or mental disabilities if the inquiry is made in good faith for a nondiscriminatory purpose.

TESTING

Employers may require pre-employment tests, provided that they are given to determine whether the applicant is physically and mentally capable of performing the job in question. All physical standards for employment should be fair, reasonable, and job-related (IA Admin. Code Sec. 240-6.2).

ENFORCEMENT

The Iowa Civil Rights Commission enforces the handicap discrimination law. The Commission has the authority to receive complaints, issue administrative decisions, and bring lawsuits in state court on behalf of alleged victims of discrimination. Individuals may bring their own lawsuits provided that they first file a complaint with the Commission. If the Commission has not concluded its action on a complaint within 120 days, the individual then may ask to sue in court on his or her own. For more information, contact the Commission at:

Handicaps/Disabilities

IOWA (continued)

The Grimes State Office Building
211 E. Maple Street, 2nd Floor
Des Moines, IA 50319
(515) 281-4425

or

1-800-457-4416

KANSAS

SUMMARY

The **Kansas Act Against Discrimination** prohibits discrimination in employment on the basis of physical handicap (KS Stat. Ann. Sec. 44-1001, *et seq.*). The law applies to employers with four or more employees.

Handicap defined. A handicap is defined as a physical condition, whether congenital or acquired by accident, injury, or disease, which constitutes a substantial disability. The disability must be unrelated to the individual's ability to perform a particular job.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Drug addiction and alcoholism. Individuals addicted to alcohol are protected under the law. Drug addiction is not considered a handicap.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap.

ENFORCEMENT

The Kansas Commission on Civil Rights enforces the Act Against Discrimination. The Commission has the authority to accept complaints, conduct hearings, issue orders, and if necessary, seek court action for compliance.

FURTHER INFORMATION

For further information, contact:

Landon State Office Building
900 S.W. Jackson, 8th Floor, Suite 8518
Topeka, KS 66612
(913) 296-3206

SUMMARY

The **Kentucky Equal Opportunities Act** prohibits employment practices that discriminate on the basis of physical disability or handicap, unless the disability restricts an individual's job performance. The Act covers employers with eight or more employees (KY Rev. Stat. Sec. 207.130, *et seq.*).

Handicap defined. The term physical handicap means a physical condition that constitutes a substantial disability to an individual and can be shown by medically accepted diagnostic techniques.

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

AIDS is a protected disability under the Equal Opportunities Act.

ALCOHOL AND DRUGS

The Act specifically excludes drug and alcohol abuse from the definition of disability.

PRE-EMPLOYMENT INQUIRIES

Under Kentucky law, an employer may ask applicants whether they are disabled and about the extent to which the disability has been overcome through treatment or rehabilitation.

ENFORCEMENT

The Commission on Human Rights enforces the Act, and can be contacted at:

Capitol Plaza Tower, Room 832
Frankfort, KY 40601
(502) 564-3350

SUMMARY

The **Louisiana Civil Rights Act for Handicapped Persons** prohibits employment practices that discriminate on the basis of handicap. The Act covers employers with 15 or more employees (LA Rev. Stat. Sec. 46:2245, *et seq.*).

Handicapped person defined. A handicapped person is one who has a mental or physical impairment that substantially limits one or more life activities, has a history of such an impairment, or is regarded by others as having an impairment.

Reasonable accommodation. The Act requires an employer to reasonably accommodate a person's disability, unless the accommodation would cause the employer undue hardship. Undue hardship is determined by considering the employee's essential job duties and specific disability and the general working environment.

ENFORCEMENT

The Commission on Human Rights enforces the Act, and can be contacted at:

The Department of Social Service
546 Main Street, 2nd Floor
Baton Rouge, LA 70801
(504) 342-2700

MAINE

SUMMARY

The **Maine Human Rights Act** prohibits discrimination in employment on the basis of physical or mental handicaps (ME Rev. Stat. Ann. Tit. 5, Sec. 4551, *et seq.*). The law applies to *all* employers in the state.

Physical or mental handicap defined. Physical or mental handicaps include:

- Conditions such as disabilities, infirmities, disfigurements, or congenital defects caused by injury, accident, disease, illness, etc.
- Conditions that, according to a physician's determination, constitute a substantial physical handicap
- Conditions that, according to a psychiatrist's or psychologist's determination, constitute a mental handicap
- Other impairments that require special education, vocational rehabilitation, or related services.

Exception. Employers are *not* required to hire or retain a physically or mentally handicapped individual who cannot satisfactorily perform the duties of the job in question or cannot perform the job without endangering the health and safety of the employee or of others in the workplace.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental limitations of an otherwise qualified handicapped employee, unless to do so would impose an undue business hardship or the employer can show that a reasonable accommodation does not exist.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a past history of drug or alcohol dependency or a current abuse problem may be protected under the Human Rights Act, provided that they can:

- Establish that their dependency constitutes a physical impairment
- Satisfactorily perform the job with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap under the law.

HARASSMENT ON THE BASIS OF HANDICAPS

Harassment on the basis of handicaps is illegal. Such harassment may include unwelcome comments, jokes, acts, and other verbal or physical conduct related to handicaps where: 1) such conduct creates a hostile work environment; 2) submission to such conduct is made a condition of employment; or 3) submission to or rejection of such conduct is used as the basis for employment decisions.

Note: Similar to laws against sexual harassment, employers may be held liable for the conduct of their agents, supervisory employees, or others in the workplace if they knew or should have known about the occurrence of handicap harassment. Employers should therefore take immediate and appropriate corrective action against any such conduct.

PRE-EMPLOYMENT INQUIRIES

Employers may not ask whether a prospective employee is handicapped, or the nature or severity of a handicap. They may, however, ask about an applicant's ability to perform job-related functions.

ENFORCEMENT

The Maine Human Rights Commission enforces the Human Rights Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions

Handicaps/Disabilities

MAINE

- Seek relief for alleged victims of discrimination in state court.

FURTHER INFORMATION

For further information, contact:

Human Rights Commission

State House

Station No. 51

Augusta, ME 04333

(207) 289-2326

MARYLAND

SUMMARY

The **Maryland Fair Employment Practices (FEP) Act** prohibits employment practices that discriminate on the basis of physical or mental handicap, unless the handicap prevents performance of the job in question (MD Ann. Code 49B, Sec. 1, *et seq.*). The Act applies to employers with 15 or more employees. Separate laws also cover public employees.

Handicapped individual defined. According to regulations issued by the Maryland Commission on Human Relations, a handicapped individual is one who:

1. Has a physical, mental, or emotional handicap that substantially limits one or more major life activities and that can be diagnosed by usual medical techniques, or
2. Has a history of such a handicap, or
3. Is regarded by others as having a handicap.

Reasonable accommodation required. The FEP Act requires employers to reasonably accommodate handicapped employees and applicants unless the accommodation would impose an undue hardship on the employer's business. Accommodation can include such things as job restructuring and physical alterations. In determining whether an accommodation would impose an undue hardship, the Commission considers: the overall size of the employer's business, that is, the number of employees, number of business locations, and financial condition of the business; the composition and structure of the employer's workforce; and the nature and cost of the accommodation.

Bona fide occupational qualification (BFOQ) exception. Employment decisions may take into consideration whether or not an individual is handicapped if mental or physical ability is a BFOQ reasonably necessary to the normal operation of the business. According to the Commission, the BFOQ exception is narrow in scope and will not be applied to include the desire or convenience of the employer.

ENFORCEMENT

The Maryland Commission on Human Relations enforces the FEP Act, and can be reached at:
20 E. Franklin Street
Baltimore, MD 21202-2274
(301) 333-1715

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

According to the Commission's regulations, the term "handicap" includes infection with Human Immunodeficiency Virus (HIV) in all its stages.

PSYCHIATRIC TREATMENT

A separate law specifically prohibits employers from requiring applicants to answer any questions about any psychological or psychiatric illness, disability, handicap, or treatment, unless it has a direct relationship to the individual's ability to perform the job in question (MD Ann. Code 100, Sec. 95A). The law is enforced by the Department of Labor and Industry, which can be reached at:

501 St. Paul Place
Baltimore, MD 21202
(301) 333-4179, or
1-(800)-492-6226

MASSACHUSETTS

SUMMARY

The **Massachusetts Fair Employment Practice Act** prohibits employment practices that discriminate on the basis of handicap or disability. The Act covers employers with six or more employees (MA Ann. Laws Ch. 151B, Sec. 1, *et seq.*) State agencies are also covered by an executive order.

Disability defined. The term handicapped or disabled applies to an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded by others as having such an impairment.

Reasonable accommodation. The Act requires employers to reasonably accommodate an individual's disability unless the accommodation would cause the employer undue hardship. According to guidelines issued by the Massachusetts Commission Against Discrimination, the following factors may be considered in determining undue hardship:

- The size and nature of the business
- The nature and cost of the needed accommodation
- Whether the public's health and safety will be compromised by providing the accommodation.

SUBSTANCE ABUSE

According to the Commission's guidelines, individuals who abuse alcohol or drugs are considered to be disabled, and employers must try to reasonably accommodate these disabilities. The Commission does not consider recreational or casual use to be a disability in most instances.

PRE-EMPLOYMENT INQUIRIES

Under state law an employer may ask only whether an applicant can perform the job duties in question. An employer may not ask whether an applicant is disabled or about the nature or severity of a disability.

MEDICAL EXAMS

Under state law an employer may not require an applicant to take a medical exam until an offer of employment has been made, and only if:

- Exams are required of all applicants in the same job category, and
- Exam results are limited to the examining physician's opinion as to whether the applicant can perform the basic job duties in question.

ENFORCEMENT

The Fair Employment Act is enforced by the Commission Against Discrimination, and can be contacted at:
McCormack State Office Building
Room 601
One Ashburton Place
Boston, MA 02108
(617) 727-3990

MICHIGAN

SUMMARY

The **Michigan Handicappers' Civil Rights Act** prohibits employment practices that discriminate on the basis of physical or mental handicap or disability. The Act covers employers with four or more employees (MI Comp. Laws Sec. 37.1101, *et seq.*).

Handicap defined. A disabled individual is one who has a physical or mental characteristic that may result from disease, injury, congenital condition of birth, or functional disorder, and that substantially limits one or more major life activities. The definition also includes those who have a record of such a characteristic or are regarded by others as having such a characteristic.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate an individual's disabilities unless to do so would impose an undue hardship. Under state law, cost can be an undue hardship if it exceeds a certain dollar amount that is tied to the state average weekly wage and the size of the employer's workforce.

PRE-EMPLOYMENT INQUIRIES

According to guidelines issued by the Michigan Civil Rights Commission, an employer may ask whether an applicant has any physical or mental impairment that would interfere with job performance.

ALCOHOL AND DRUG ABUSE

According to the state Commission, individuals with current substance abuse problems are considered disabled provided there is medical confirmation of the problem and it does not interfere with job performance.

ENFORCEMENT

The Department of Civil Rights enforces the Act, and can be contacted at:
303 W. Kalamazoo, 4th Floor
Lansing, MI 48913
(517) 334-6079

MINNESOTA

SUMMARY

The **Minnesota Human Rights Act** prohibits employment practices that discriminate on the basis of disability. The Act covers *all* employers, regardless of size (MN Stat. Sec. 363.01, *et seq.*). State agencies are also covered by a separate law (MN Stat. Sec. 43A.01).

Disability defined. A disabled person is one who has any physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded by others as having such an impairment.

SPECIFIC HANDICAPS

Alcohol and drugs. Alcoholism and drug addiction are considered protected disabilities, provided the condition does not prevent the individual from performing his or her job duties, or does not create a safety threat to property or to others in the workplace.

Acquired Immune Deficiency Syndrome (AIDS). The Department of Human Rights has taken the position that AIDS is a physical handicap.

REASONABLE ACCOMMODATION

Employers with more than 50 employees are required to reasonably accommodate the known disabilities of qualified employees, unless the accommodation would pose an undue hardship. Reasonable accommodation can include such things as physical alterations of facilities, job restructuring, and modified work schedules.

PHYSICAL EXAMINATIONS

Employers may require disabled persons to submit to physical examinations if:

- An offer of employment has been made
- The examination tests only essential job-related skills; or
- The examination is required of all persons offered the same position, regardless of disability.

ENFORCEMENT

The Department of Human Rights enforces the Act, and can be contacted at:

Bremer Tower, 5th Floor
7th Place and Robert Street
St. Paul, MN 55101
(612) 296-5663

MISSISSIPPI

SUMMARY

Mississippi has no comprehensive fair employment law covering private employers. Employers in the state are covered, where applicable, by federal laws on handicap discrimination. For further details, refer to the NATIONAL section.

PUBLIC EMPLOYMENT

State law prohibits discrimination on the basis of blindness or other physical handicap in state employment, public schools, and in any other employment supported by state funds (MS Code Ann. Sec. 43-6-15).

FURTHER INFORMATION

For further information on state law, contact:

Employment Security Commission
1520 West Capitol, P.O. Box 1699
Jackson, MS 39205
(601) 354-8711

MISSOURI

SUMMARY

The **Missouri Fair Employment Practices Act** prohibits employment practices that discriminate on the basis of handicap. The Act covers employers with six or more employees.

Handicap defined. According to guidelines issued by the Missouri Commission on Human Rights, a handicapped person is one who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded by others as having such an impairment.

REASONABLE ACCOMMODATION

According to the Commission's guidelines, employers are required to reasonably accommodate an individual's known disabilities. To determine whether an accommodation would be reasonable, the Commission considers the nature and cost, the size and nature of the employer's business, past good-faith efforts to accommodate similar disabilities, and any external constraints, such as a building lease.

PHYSICAL EXAMINATIONS

According to the Commission's guidelines, employers may conduct pre-employment physicals that are related to minimum physical standards for the job in question provided:

- The physicals are given to all applicants for the job, regardless of disability
- The minimum physical standards are related to ability to perform *essential* job duties
- Examination results are given the same consideration for all applicants, regardless of disability.

PRE-EMPLOYMENT INQUIRIES

According to the Commission's guidelines, employers may ask applicants only whether they are able to perform the job duties in question. Employers may *not* ask applicants whether they have any disabilities or about the nature or severity of any disabilities.

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

Missouri law specifically prohibits employment practices that discriminate against individuals with AIDS or related conditions.

ENFORCEMENT

The Missouri Commission on Human Rights enforces the Act, and can be contacted at:

315 Ellis Boulevard
P.O. Box 1129
Jefferson City, MO 65102
(314) 751-3325

SUMMARY

The **Montana Human Rights Act** prohibits discrimination in employment on the basis of physical or mental handicaps (MT Code Ann. Sec. 49-2-101, *et seq.*). The law applies to *all* employers in the state.

Physical or mental handicap defined. Physical or mental handicaps include:

- Conditions such as disabilities, infirmities, disfigurements, or congenital defects caused by injury, accident, disease, illness, etc.
- Mental disabilities resulting in below average intelligence or impaired social competence.

The law covers handicapped individuals, those having a record of being handicapped, and those who are perceived as being handicapped.

Exception. Employers are *not* required to hire or retain a physically or mentally handicapped individual who cannot satisfactorily perform the duties of the job in question or cannot perform the job without endangering the health and safety of the employee or of others in the workplace.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental limitations of an otherwise qualified handicapped employee, unless to do so would impose an undue business hardship.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Human Rights Act, provided that they can:

- Establish that their dependency constitutes a mental or physical handicap
- Satisfactorily perform the job with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap under the law.

PRE-EMPLOYMENT INQUIRIES

Employers should avoid general questions regarding whether a prospective employee is handicapped. According to the Montana Human Rights Commission, general questions may be interpreted as an intent to bar all handicapped individuals, since some handicaps would not preclude adequate performance of particular jobs. Employers should instead ask whether the applicant has a specific handicap if that handicap would affect job performance.

HANDICAPPED PREFERENCE IN PUBLIC EMPLOYMENT

Montana law grants a preference in public employment to handicapped individuals who are certified by the state Department of Social and Rehabilitation Services to have a substantial physical or mental handicap, or their eligible spouses (i.e., the spouse of a 100 percent handicapped individual who cannot use the employment preference because of the disability) (MT Code Ann. Sec. 39-30-101, *et seq.*). The law provides that public employers must hire preference-eligible applicants over other applicants with substantially equal qualifications. The term "public employer" includes cities, counties, towns, state departments, agencies, commissions, etc., but does *not* include school districts, community colleges, or the state university system.

ENFORCEMENT

The Montana Human Rights Commission enforces the Human Rights Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

Handicaps/Disabilities

MONTANA *(continued)*

FURTHER INFORMATION

For further information, contact:

Human Rights Commission
Room C-317 Cogswell Bldg.
Capitol Station
Box 1728
Helena, MT 59624
(406) 444-2884

NEBRASKA

SUMMARY

The **Nebraska Fair Employment Practices Act** prohibits discrimination in employment on the basis of physical or mental disability (NE Rev. Stat. Sec. 48-1101, *et seq.*). The law applies to employers with 15 or more employees.

Physical or mental disability defined. Individuals who have a physical or mental disability include those:

- With a physical or mental condition, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness
- With a physical or mental condition that constitutes a substantial handicap, as verified by a physician.

Exception. Employers are *not* required to hire or retain a physically or mentally disabled individual whose condition reasonably precludes the performance of the job in question.

ACCOMMODATION NOT REQUIRED

Nebraska law does *not* require that employers reasonably accommodate applicants or employees with physical or mental disabilities. Employers must simply treat all qualified individuals equally.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Fair Employment Practices Act.

Acquired Immune Deficiency Syndrome (AIDS). AIDS may also be protected as a disability under the Act.

ENFORCEMENT

The Nebraska Equal Opportunity Commission enforces the Fair Employment Practices Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions.

FURTHER INFORMATION

For further information, contact:

Nebraska Equal Opportunity Commission
P.O. Box 94934
301 Centennial Mall, South
Lincoln, NE 68509
(402) 471-2024

SUMMARY

The **Nevada Fair Employment Practices Act** prohibits discrimination in employment on the basis of physical, aural, or visual handicap (NV Rev. Stat. Sec. 613.310, *et seq.*). The law applies to employers with 15 or more employees.

Handicapped defined. Handicapped individuals are those:

- With a physical, aural, or visual impairment that substantially limits one or more major life activities
- With a record of such an impairment
- Regarded as having such an impairment.

Exception. Employers are *not* required to hire or retain a physically handicapped individual whose condition precludes proper performance of the job in question.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical impairments of a qualified handicapped employee, unless to do so would impose an undue business hardship.

GUIDE AND HEARING DOGS

It is illegal to discriminate against a handicapped individual by interfering, directly or indirectly, with the use of a guide or hearing dog. Employers must allow handicapped employees to keep their guide or hearing dog with them at all times in the workplace.

SPECIFIC HANDICAPS

Acquired Immune Deficiency Syndrome (AIDS). AIDS may be protected as a handicap under the law.

Drug and alcohol addiction. Individuals with a drug or alcohol dependency are *not* protected.

Mental handicaps. The law specifically *excludes* from protection individuals who are mentally handicapped, including the mentally ill.

ENFORCEMENT

The Nevada Equal Rights Commission enforces the Fair Employment Practices Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its decisions in state court.

FURTHER INFORMATION

For further information, contact:

Nevada Equal Rights Commission
1515 E. Tropicana, Suite 590
Las Vegas, NV 89158
(702) 486-7161

NEW HAMPSHIRE

SUMMARY

The **New Hampshire Law Against Discrimination** prohibits discrimination in employment on the basis of physical or mental handicap (NH Rev. Stat. Ann. 354-A:1, *et seq.*). The law applies to employers with six or more employees.

Physical or mental handicap defined. Individuals who have a physical or mental handicap include those:

- With a permanent, long-term, or chronic physical or mental impairment that substantially limits one or more major life activities
- With a record of such an impairment
- Regarded as having such an impairment.

Exception. Employers are *not* required to hire or retain physically or mentally handicapped individuals who cannot satisfactorily perform the duties of the job in question without presenting a hazard to themselves or to other employees.

ACCOMMODATION NOT REQUIRED

New Hampshire law does *not* require that employers reasonably accommodate applicants or employees with physical or mental handicaps. Employers must simply treat all qualified individuals equally.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Law Against Discrimination, provided that they can:

- Establish that their dependency constitutes a physical handicap
- Satisfactorily perform the job without creating a hazard in the workplace.

Acquired Immune Deficiency Syndrome (AIDS). AIDS may be protected as a handicap.

PRE-EMPLOYMENT INQUIRIES

Employers may not make general inquiries regarding non-job-related handicaps. They may, however, inquire into whether an applicant has a particular kind of physical or mental handicap that might interfere with performance or safety on the job.

ENFORCEMENT

The New Hampshire Commission for Human Rights enforces the Law Against Discrimination. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue enforceable orders.

FURTHER INFORMATION

For further information, contact:

Commission for Human Rights
163 Loudon Road
Concord, NH 03301
(603) 271-2767

SUMMARY

The **New Jersey Law Against Discrimination** prohibits employers from discriminating in employment because of physical or mental handicaps that do not preclude satisfactory job performance (NJ Rev. Stat. Sec. 10:5-1, *et seq.*). The Law applies to all employers. The term "handicap" includes physical, mental, psychological, or developmental disabilities, whether caused by injury, birth defect, or illness that:

- Prevent the normal exercise of any bodily or mental function; or
- Can be demonstrated by accepted diagnostic techniques.

Reasonable accommodation. The Law requires that employers must make reasonable accommodation for the needs of handicapped individuals.

SPECIFIC HANDICAPS

Drug and alcohol addiction. According to the New Jersey Division on Civil Rights, alcoholism and drug abuse could be protected under the handicap discrimination statute, if the condition does not presently interfere with the ability to perform the job.

Acquired Immune Deficiency Syndrome (AIDS). The Civil Rights Division has declared that AIDS is a protected disability.

Diseases. The Law specifically protects persons with "atypical hereditary cellular or blood trait," defined as sickle-cell, hemoglobin C, thalassemia, Tay-Sachs, or cystic fibrosis trait.

EXCEPTIONS/DEFENSES

The law concerning the employment rights of disabled persons does not extend to those persons whose disabilities prevent them from reasonably performing the job. Therefore, it is not an illegal employment practice to refuse to hire or to terminate an employee who is physically or mentally unable to perform the job.

ADVERTISING

The law bans any advertisement that discriminates on the basis of a handicap.

PHYSICAL EXAMINATIONS

Pre-employment physical examinations are lawful if:

- An offer of employment has been made
- The standards used are reasonably necessary for the job
- They are uniformly required of all applicants.

PRE-EMPLOYMENT INQUIRIES

Employers may only make pre-employment inquiries about disabilities that directly relate to the ability to perform the job in question.

ENFORCEMENT

The New Jersey Division on Civil Rights enforces the Law against Discrimination. The Division has the authority to:

- Receive, investigate, and settle complaints
- Hold hearings
- Issue subpoenas
- Initiate its own complaints
- Take action in state court to enforce its orders.

Handicaps/Disabilities

NEW JERSEY *(continued)*

Persons alleging that they have been injured by a violation of the law can also bring a private lawsuit in state court to enforce their rights.

New Jersey has established the Division on the Deaf, under the Department of Labor, and the Division of Advocacy for the Developmentally Disabled, under the Department of the Public Advocate, to address the needs of persons with these specific handicaps.

The Division can be reached at:

The Department of Law and Safety
1100 Raymond Boulevard
Newark, NJ 07102
(201) 648-2700

SUMMARY

The New Mexico Human Rights Act prohibits discrimination in employment on the basis of physical or mental handicap, or medical condition (NM Stat. Ann. Sec. 28-1-1, *et seq.*). The law applies to employers with four or more employees.

Handicapped defined. Handicapped individuals are those:

- With a physical or mental impairment that substantially limits one or more major life activities
- With a record of a substantial impairment
- Regarded as having a substantial impairment.

Medical condition defined. Medical condition is defined to include a "clearly visible disablement," as recognized by medical authorities or by direct witness. According to a spokesperson for the Human Rights Division, this rather open-ended definition makes New Mexico's handicap discrimination law one of the broadest in the country.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental handicap or medical condition of a qualified handicapped employee, i.e., one who can perform the essential functions of the job, *unless* to do so would impose an undue business hardship.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Human Rights Act, provided that they can:

- Establish that their dependency constitutes a substantial physical or mental impairment or clearly visible disablement
- Satisfactorily perform the essential functions of the job with reasonable accommodation.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap under the law.

ADMINISTRATION

The Human Rights Division of the state Department of Labor administers the Human Rights Act. An Education Bureau is available to answer discrimination questions and provide assistance to employers to ensure compliance with the Act.

FURTHER INFORMATION

For further information, contact:

Education Bureau
Human Rights Division
Department of Labor
1596 Pacheco
Santa Fe, NM 87502
(505) 827-6838

SUMMARY

The **New York Human Rights Law** prohibits employment practices that discriminate on the basis of disability. The Law covers employers with four or more employees (NY Exec. Laws Sec. 290, *et seq.*). Separate laws also cover public employers and government contractors.

Disability defined. A disabled individual is one who has a physical or mental impairment that prevents the exercise of a normal bodily function or can be demonstrated by medically accepted diagnostic techniques, has a record of such an impairment, or is regarded by others as having such an impairment.

MEDICAL EXAMINATIONS

According to rulings issued by the New York State Division of Human Rights, an employer may require an applicant to submit to a medical exam only after an offer of employment has been made, unless the exam is based on a bona fide occupational qualification.

PRE-EMPLOYMENT INQUIRIES

According to the Division, an employer may ask *only* whether an applicant can perform the job duties in question. It is unlawful to ask whether an applicant is disabled or has been treated for a specific disease.

ENFORCEMENT

The Division of Human Rights enforces the Act, and can be contacted at:

55 W. 125th Street
New York, NY 10027
(212) 870-8790

NORTH CAROLINA

SUMMARY

The **North Carolina Handicapped Persons Protection Act** prohibits employment practices that discriminate based on handicaps. The Act covers employers with 15 or more employees (NC Gen. Stat. Sec. 168A-1, *et seq.*). Persons whose only employees are domestic or farm workers hired to work in their home or on their farm are not subject to this law.

A separate law also prohibits discrimination by any department or agency of state government in hiring and recruitment because of handicaps (NC Gen. Stat. Sec. 128-15.3).

Handicap defined. A handicapped person is defined as one who actually has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is treated as though he or she has an impairment.

Qualified handicapped person. A qualified handicapped person is one who can satisfactorily perform the job in question:

- With or without reasonable accommodation
- At the same standard of performance as other employees
- Without creating an unreasonable risk to anyone's health or safety.

Exceptions. Conditions not considered handicaps include:

- Sexual preference
- Active alcoholism or drug abuse
- Any condition that is temporary in nature.

REASONABLE ACCOMMODATION

The law requires that an employer reasonably accommodate a qualified handicapped employee, provided that the employee makes the nature of the disability known to the employer, submits any necessary medical documentation, and cooperates in discussing possible accommodations.

Employers may be required to make physical changes in the facilities, modify equipment, provide mechanical aids, or restructure the job.

Employers *cannot* be required to:

- Hire someone to help the handicapped employee
- Reassign job duties to the detriment of other employees
- Deviate from bona fide seniority practices
- Provide personal items such as eyeglasses, unless provided to other employees
- Make physical changes that would cost more than 5 percent of the employee's annual salary.

PERMISSIBLE PRACTICES

It is *not* a discriminatory action for an employer to:

- Make employment decisions based on physical or mental requirements found in other state or federal laws or regulations
- Refuse to hire, transfer, promote, or to discharge a handicapped person who has a history of drug abuse or who unlawfully uses drugs where the job in question involves the manufacture, selling, distribution, or handling of controlled substances
- Refuse to hire, transfer, promote, or to discharge a handicapped person with a communicable disease that would disqualify a nonhandicapped person from similar employment.

Pre-employment inquiries. The law does not prohibit making pre-employment inquiries regarding whether the person can perform the job in question, but an employer cannot require applicants to identify themselves

Handicaps/Disabilities

NORTH CAROLINA *(continued)*

as handicapped prior to a conditional job offer.

Physical examinations after offer to hire. Employers may require a medical examination if an offer of employment has been made on the condition that the person meet the physical and mental requirements of the job. The exam must be intended to measure job ability or to determine necessary accommodations. Additionally, medical examinations may be required or requested to obtain information for the purpose of establishing an employee health record.

Pre-employment inquiries. Employers may require pre-employment tests, provided that they are given to all applicants and measure job-related skills.

ENFORCEMENT

A person may file a civil suit in state court if he or she has been discriminated against by conduct that the Handicapped Act prohibits.

The North Carolina Personnel Commission enforces the law prohibiting state employers from discriminating against handicapped applicants (NC Gen. Stat. Sec. 126.4). The Commission is authorized to investigate complaints, conduct hearings, and issue administrative rulings. Decisions may be appealed to the state courts.

The Commission can be reached at:

116 W. Jones Street (mail)
Administration Building
Raleigh, NC 27611
(919) 733-7996

NORTH DAKOTA

SUMMARY

The **North Dakota Human Rights Act** prohibits discrimination in employment on the basis of physical or mental handicap (ND Cent. Code Sec. 14-02.4-01, *et seq.*). The law applies to employers with 10 or more employees.

Physical or mental handicap defined. Individuals who have a physical or mental handicap include those:

- With a physical or mental impairment that substantially limits one or more major life activities
- With a record of such an impairment
- Regarded as having such an impairment.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental limitations of an otherwise qualified handicapped employee, unless to do so would impose an undue business hardship.

ENFORCEMENT

The North Dakota Department of Labor enforces the Human Rights Act. The Department has the authority to receive and investigate discrimination complaints, and to negotiate settlements.

Individuals who feel they have been injured by a violation of the Act may file a complaint with the Department of Labor, and may also bring a private lawsuit in state court.

FURTHER INFORMATION

For further information, contact:

Department of Labor
State Capitol, 5th Floor
Bismark, ND 58505
(701) 224-2660

SUMMARY

The **Ohio Fair Employment Practice Law** prohibits employment practices that discriminate based on handicap. The Law covers *all* employers (OH Rev. Code Ann. Sec. 4112, *et seq.*).

The Law protects persons who have handicaps and those who are perceived as having handicaps. The term "handicap" is defined as a physical, mental, or visual impairment or limitation that:

- Reasonably limits the individual's functional ability
- Can be medically diagnosed
- Appears certain to continue for a considerable length of time.

Drug and alcohol addiction. The Ohio Supreme Court has ruled that alcoholism and drug abuse are protected handicaps under the state discrimination law.

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

The Ohio Civil Rights Commission has issued a policy statement that defines AIDS as a handicap within the meaning of the state's Fair Employment Practices Law. The statement also cautions employers that mandatory testing for AIDS or the use of test results may violate Ohio's prohibition against employment practices that discriminate on the basis of handicaps.

REASONABLE ACCOMMODATION

Employers must reasonably accommodate the handicapped applicant or employee unless to do so would create an undue business hardship. Reasonable accommodations include job restructuring, scheduling modifications, and mechanical devices.

Exceptions. Employers are not required to make reasonable accommodations if the handicap:

- Prevents substantial job performance
- Significantly increases occupational hazards to the handicapped person, other employees, the general public, or the work facilities.

PRE-EMPLOYMENT INQUIRIES

According to rules issued by the Ohio Civil Rights Commission, employers may make pre-employment inquiries regarding handicaps if the inquiries are designed to determine whether the individual:

- Can perform the job
- Requires reasonable accommodation for a handicap.

APPLICATIONS AND TESTING

The same rules allow employers to require tests that evaluate job-related skills if the tests:

- Accurately reflect the applicant's or employee's job skills, rather than focus on the handicap
- Are the most efficient tests to predict job performance with the least adverse effect in terms of the handicap.

PHYSICAL EXAMINATIONS

Other law permits pre-employment physical examinations if they are:

- To determine whether prospective employees can perform the job without significantly increasing occupational hazards
- For other purposes, such as health records and preventive medicine programs, if not limited to handicapped applicants.

Handicaps/Disabilities

OHIO *(continued)*

ENFORCEMENT

The Ohio Civil Rights Commission enforces the Fair Employment Practice Law. The Commission has the authority to:

- Receive, investigate and settle discrimination complaints
- Initiate its own complaints
- Issue subpoenas
- Hold hearings.

The Commission can be reached at:

220 Parsons Avenue
Columbus, OH 43266
(614) 466-7637

SUMMARY

The **Oklahoma Civil Rights Act** prohibits employment practices that discriminate on the basis of handicap, provided the individual can perform the job duties in question with reasonable accommodation. The Act covers employers with 15 or more employees (OK Stat. Ann. Title 25 Sec. 1101, *et seq.*). Separate laws also cover state agencies.

Handicap defined. A handicapped or disabled individual is one who:

- Has a physical or mental impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded by others as having such an impairment.

Reasonable accommodation. According to guidelines issued by the Oklahoma Human Rights Commission, reasonable accommodation can include job restructuring, modified work or attendance schedules, purchase of special assisting devices, or modification of equipment, work sites, or common areas.

PRE-EMPLOYMENT INQUIRIES

An employer may not ask whether an individual has a disability or about the nature or severity of any handicap. An employer may, however, ask whether an applicant has the ability to perform the job duties in question.

PHYSICAL EXAMINATIONS

Under state law, employers may give pre-employment physical examinations if:

- They are uniformly given to all entering employees in the same job category
- They are given after an offer of employment has been made
- The results are only used to determine whether the person meets the physical and mental requirements of the job
- The results are kept confidential, with disclosure of pertinent information made only to certain personnel for reasons of accommodation or health and safety.

ENFORCEMENT

The Oklahoma Human Rights Commission enforces the handicap discrimination law. Contact them at:

Oklahoma Human Rights Commission
Room 480
2101 N. Lincoln Blvd.
Oklahoma City, OK 73105
(405) 521-2360

The Human Rights Commission and the Ethics and Merit Commission enforce the prohibition on discrimination by state agencies.

SUMMARY

State law prohibits discrimination in employment against disabled individuals where the particular disability does not prevent performance of the job (OR Rev. Stat. Sec. 659.405, *et seq.*). The law applies to employers with six or more employees.

Disability defined. A disabled person means a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified disabled applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the disabled, job restructuring, modifying work schedules or equipment, and other similar actions.

PROBABLE INJURY

According to the Oregon Supreme Court, employers need not employ a disabled individual where it is *probable* that the individual will be injured by performing the job. If there is simply a *possibility* that injury might be sustained, an employer would not be legally justified in refusing to hire or promote the disabled individual. *Montgomery Ward & Co., Inc. v. Oregon Bureau of Labor*, 16 FEP 80 (OR 1977).

Additionally, employers are not required to hire a disabled individual for a position that includes an inherent risk of injury to co-workers or the general public where the impairment, even with reasonable accommodation, materially enhances the risk.

SPECIFIC DISABILITIES

Drug addiction and alcoholism. Drug addiction and alcoholism are protected as disabilities under the law, provided that the individual can perform the duties of the job in question, with reasonable accommodation and without risk to the worker or others.

Acquired Immune Deficiency Syndrome (AIDS). The Oregon Bureau of Labor and Industries has declared that AIDS is a protected disability under state law. Oregon also has an AIDS-testing law that requires confidentiality and that the person to be tested give his or her informed consent.

Mental disorders. The law specifically provides that treatment or alleged treatment for a mental disorder does not constitute evidence of an individual's inability to perform a particular job. Employers, therefore, should not make hiring decisions solely on the basis of a history of, or allegations of, mental illness.

ENFORCEMENT

The Bureau of Labor and Industries enforces the **Fair Employment Practice Act**. The Bureau has the authority to receive, investigate, and make determinations regarding discrimination complaints, and issue orders enforceable in state court, and can be contacted at:

Civil Rights Division
State Office Building
1400 SW Fifth Avenue
Portland, OR 97201
(503) 229-5900

Handicaps/Disabilities

PENNSYLVANIA

SUMMARY

The **Pennsylvania Human Relations Act** prohibits employment practices that discriminate on the basis of physical or mental handicap or disability. The Act covers employees with four or more employees. (PA Rev. Stat., Ch. 43, Secs. 951, *et seq.*).

Disability defined. A disabled individual is one who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded by others as having such an impairment.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate an individual's disability unless to do so would impose an undue hardship. According to guidelines issued by the Pennsylvania Human Relations Commission, accommodations can include, among other things, modifying tools and equipment, and job restructuring.

Undue hardship. In determining whether there is undue hardship, the Commission looks at the overall size and nature of the employer's business, the extent and cost of the accommodation, the structure of the employer's workforce, and the number and type of facilities.

PRE-EMPLOYMENT INQUIRIES

Pennsylvania law allows an employer to ask an applicant about disabilities that are job related.

MEDICAL EXAMINATIONS

Pennsylvania law allows an employer to require pre-employment medical examinations, provided all applicants for the job in question are required to take the same exam.

ENFORCEMENT

The Human Relations Commission enforces the Act, and can be contacted at:

101 S. Second Street
Harrisburg, PA 17101
(717) 787-4410

SUMMARY

The **Rhode Island Fair Employment Practices Act** prohibits discrimination in employment on the basis of handicap (RI Gen. Laws Sec. 28-5-1, *et seq.*). The law applies to employers with four or more employees.

Handicap defined. Individuals who have a handicap include those:

- With a physical or mental impairment that substantially limits one or more major life activities
- With a record of such an impairment
- Regarded as having such an impairment.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental handicap of a qualified handicapped employee, *unless* to do so would impose an undue business hardship.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Fair Employment Practices Act.

Acquired Immune Deficiency Syndrome (AIDS). AIDS may also be protected as a handicap.

ENFORCEMENT

The Rhode Island Commission for Human Rights enforces the Fair Employment Practices Act. The commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

FURTHER INFORMATION

For further information, contact:

Commission for Human Rights
10 Abbott Park Place
Providence, RI 02903
(401) 277-2661

SUMMARY

The **South Carolina Bill of Rights for Handicapped Persons** prohibits employment practices that discriminate on the basis of handicap, unless there is reasonable justification for the practice. The law covers *all* employers, regardless of size (SC Code Ann. Sec. 43-33-510, *et seq.*).

Handicap defined. The term "handicap" means a substantial mental or physical impairment, whether congenital or acquired as a result of injury or disease, that:

- Can be verified by medical findings, and
- Appears reasonably certain to continue throughout the person's lifetime without substantial improvement, but
- Is unrelated to the person's ability to perform the job in question.

Exceptions. The term handicap does *not* include alcohol or other substance abuse, mental illness, or any condition that is only regarded by others as being a handicap.

Reasonable justification. An employer may discriminate against an applicant or employee based on handicap if the handicap interferes with job performance. This determination should take into consideration such factors as cost, safety, and efficiency. An employer's determination with respect to reasonable justification will be given substantial deference unless the employer is trying to avoid its obligations under the law.

ENFORCEMENT

The Human Affairs Commission enforces this law, and can be contacted at:

Richard Building
2611 Forest Drive
P.O. Box 11009 (mail)
Columbia, SC 29211
(803) 737-6580

SUMMARY

The **South Dakota Human Relations Act** prohibits discrimination in employment on the basis of disability (SD Codified Laws Ann. Sec. 20-13-1, *et seq.*). The law applies to *all* employers in the state.

Disability defined. Individuals who have a disability include those with:

- Any determinable physical characteristic that may result from disease, injury, congenital condition of birth, or functional disorder
- A history of such a characteristic.

Exception. Employers are *not* required to hire or retain a physically disabled individual who cannot perform the duties of a particular job or who does not have the qualifications for employment or promotion.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the qualified disabled employee, *unless* to do so would impose an undue business hardship.

SPECIFIC HANDICAPS

Drug and alcohol addiction. Individuals with a drug or alcohol dependency may be protected under the Human Relations Act.

Acquired Immune Deficiency Syndrome (AIDS). AIDS may also constitute a disability under the law.

ENFORCEMENT

The South Dakota Department of Commerce's Division of Human Rights enforces the Human Relations Act. The Division has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its orders in state court.

FURTHER INFORMATION

For further information, contact:

Division of Human Rights
500 East Capitol
Pierce, SD 57501
(605) 773-4493

Handicaps/Disabilities

TENNESSEE

SUMMARY

Tennessee law prohibits employment practices that discriminate on the basis of handicap or disability. The law covers all employers, regardless of size (TN Code Ann. Sec. 8-50-103). A separate law also covers public employers and employers supported in whole or in part by public funds.

FURTHER INFORMATION

For more information, contact the:

Human Rights Commission
Capitol Boulevard Building
226 Capitol Boulevard
Nashville, TN 37219-5095
(615) 741-5825

SUMMARY

The **Texas Commission on Human Rights Act** prohibits employment practices that discriminate on the basis of disability (TX Labor Code Ann. Title 83, Ch. 16, Art. 5221k, *et seq.*). The term "disability" includes any physical or mental impairment that substantially limits one or more major life activities, or having a record of such an impairment. The Act covers employers with 15 or more employees. The **Mentally Retarded Persons Act** also prohibits employment practices that discriminate based on mental retardation, unless there is a bona fide occupational qualification and the retardation significantly impairs the person's job performance.

Alcohol and drugs. The Human Rights Act excludes current alcohol or other substance abuse from the definition of disability.

Acquired Immune Deficiency Syndrome (AIDS). The Act also excludes a currently communicable disease or infection, including AIDS or HIV infection, that poses a direct threat to health and safety in the workplace or prevents the affected person from performing his or her job duties.

Reasonable accommodation. The Human Rights Act requires an employer to reasonably accommodate a person's disability, unless the disability impairs job performance or the accommodation would cause the employer undue hardship. If a discrimination complaint is filed against an employer and the employer claims undue hardship, the Human Rights Commission will evaluate the reasonableness of the cost involved and the availability of alternatives.

ENFORCEMENT

The Texas Human Rights Commission enforces the Act, and can be contacted at:

John H. Winters Human Services Building
P.O. Box 2960
Austin, TX 78765
(512) 450-3040

SUMMARY

The **Utah Anti-Discrimination Act of 1965** prohibits discrimination in employment against any person, otherwise qualified, because of a handicap (UT Code Ann. Sec. 34-35-1, *et seq.*). The law applies to employers with 15 or more employees.

"Otherwise qualified" defined. Individuals are considered otherwise qualified if they have the education, training, moral character, integrity, disposition to work, willingness to adhere to reasonable rules and regulations, and other qualifications for the particular job.

Handicap defined. Handicap is defined as:

- A physical or mental impairment that substantially limits one or more major life activities
- A history or record of such an impairment
- Being regarded as having such an impairment.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Acquired Immune Deficiency Syndrome (AIDS). AIDS may be protected as a handicap under the law.

Drug and alcohol addiction. Drug and alcohol abusers may also be protected.

ENFORCEMENT

The Industrial Commission of Utah enforces the Anti-Discrimination Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions.

FURTHER INFORMATION

For further information, contact:

Industrial Commission
Anti-Discrimination Division
160 E. 3rd Street South
P.O. Box 510910
Salt Lake City, UT 84151
(801) 530-6801

SUMMARY

The **Vermont Fair Employment Practice Act** prohibits discrimination in employment against qualified handicapped individuals (VT Stat. Ann. Tit. 21, Sec. 494, *et seq.*). The law applies to *all* employers in the state.

Handicapped defined. Handicapped individuals are those:

- With a physical or mental impairment that substantially limits one or more major life activities
- With a history or record of such an impairment
- Treated or perceived as having such an impairment.

Qualified handicapped individuals. Qualified handicapped individuals are those who can perform the essential functions of the job in question with reasonable accommodation.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Drug addiction and alcoholism. Drug addiction and alcoholism are protected as handicaps, provided that the individual can perform the duties of the job in question without constituting a direct threat to property or the safety of others.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is protected as a handicap under the law.

ENFORCEMENT

The Civil Rights Division of the state Attorney General's office enforces the Fair Employment Practice Act. The Division has the authority to receive, investigate, and make determinations regarding discrimination complaints, and take appropriate cases to state court.

FURTHER INFORMATION

For further information, contact:

Attorney General of Vermont
Civil Rights Division
Pavilion Office Building
109 State Street
Montpelier, VT 05602
(802) 828-3171

SUMMARY

The **Virginians With Disabilities Act** (VA Code Sec. 51.01-41) and the **Virginia Human Rights Act** (VA Code Sec. 2.1-714, *et seq.*) prohibit employment practices that discriminate on the basis of physical or mental disability. Both laws cover *all* employers. Separate laws also cover state agencies and public contractors.

Disability defined. The term disability generally includes any physical or mental impairment that substantially limits one or more of a person's life activities, or the record of such an impairment.

Disabilities excluded. The following are not protected:

1. Current alcohol or other substance abuse
2. Any mental impairment that has been successfully asserted by a person as a defense to a criminal charge.

Reasonable accommodation. The laws require an employer to reasonably accommodate a person's disability, unless the disability prevents performance of the job duties in question or the accommodation would cause the employer undue hardship. Undue hardship is determined based on the following factors:

- Size of the facility
- Nature and composition of the workforce
- Nature and cost of the accommodation
- Whether the disabled person will pose a health and safety threat to him or herself, co-workers, or the public
- The possibility that other prospective employees will be able to use the same accommodation.

FURTHER INFORMATION

For more information, contact the:

Office of Civil Rights
Department of Social Services
Nelson Building
1503 Santa Rosa Road
Richmond, VA 23288
(804) 662-9971

or

The Department of Labor and Industry
P.O. Box 12064
Richmond, VA 23241
(804) 786-2376

SUMMARY

The **Washington Law Against Discrimination** prohibits employment practices that discriminate on the basis of mental or physical disability. The Law covers employers with eight or more employees (WA Rev. Stat. Sec. 49.60.010, *et seq.*).

Separate laws also cover state agencies, local governments, and employers supported in whole or in part by public funds.

Disability defined. According to regulations issued by the Washington State Human Rights Commission, a disability is any physical or mental impairment that impedes an individual in acquiring and retaining permanent employment or promotional opportunities.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate an individual's disabilities unless it would cause undue hardship. According to the Commission's guidelines, the following factors will be considered in determining whether the cost of accommodating a disability is an undue hardship:

- The size of the employer's business
- The value of the employee's work
- Whether the cost can be included in other planned remodeling or maintenance.

ENFORCEMENT

The Washington State Human Rights Commission enforces the Law, and can be contacted at:

Evergreen Plaza Building
711 S. Capitol Way
Mail Stop FJ-41
Olympia, WA 98504-3341
(206) 753-6770/2558

WEST VIRGINIA

SUMMARY

The **West Virginia Human Rights Act** prohibits discrimination in employment on the basis of blindness or handicap (WV Code Sec. 5-11-1, *et seq.*). The law applies to employers with 12 or more employees.

Handicap defined. Handicap is defined as:

- A physical or mental impairment that substantially limits one or more major life activities
- A record of such an impairment
- Being regarded as having such an impairment.

Qualified handicapped individuals. Qualified handicapped individuals are those who can perform the essential functions of the job in question with reasonable accommodation. An employer may refuse to hire or may discharge handicapped individuals if, even after reasonable accommodation, they are unable to perform the job without creating a substantial hazard to their health and safety or that of others.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Drug addiction and alcoholism. Drug addiction and alcoholism are specifically protected under the law.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered a handicap.

ENFORCEMENT

The West Virginia Human Rights Commission enforces the Human Rights Act. The Commission has the authority to accept complaints, conduct hearings, issue orders, and seek court action for compliance.

FURTHER INFORMATION

For further information, contact:

Human Rights Commission
1036 Quarrier Street, 215 Professional Building
Charleston, WV 25301
(304) 348-2616

SUMMARY

The **Wisconsin Fair Employment Act** prohibits all employers in the state from discriminating in employment on the basis of handicaps (WI Stat. Ann. Sec. 111.31, *et seq.*). Separate state laws prohibit state contractors and subcontractors from discriminating in employment because of handicaps, physical conditions, or developmental disabilities (WI Stat. Sec. 16.765), and prohibit discrimination in state employment on the basis of handicaps.

It is not discriminatory to exclude from employment consideration individuals whose handicaps are reasonably related to the ability to adequately perform the responsibilities of the job. Such decisions should be made on a case-by-case basis, taking into account the present and future safety of the individual, co-workers, and the general public.

HANDICAPPED DEFINED

Handicapped individuals include those who:

- Have a physical or mental impairment that makes achievement unusually difficult or limits the capacity to work
- Have a record of such an impairment
- Are perceived as having such an impairment.

SPECIFIC HANDICAPS

Alcoholism and drug abuse. According to the Wisconsin Department of Industry, Labor, and Human Relations (DILH), alcoholism and drug addiction may be protected handicaps. An employer could therefore be required to reasonably accommodate the alcoholic or drug dependent employee, provided that the individual:

- Can satisfactorily perform the job
- Does not create a direct threat to safety.

The Wisconsin Supreme Court has also specifically ruled that alcoholism is a handicap under the Fair Employment Act.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is protected as a handicap under the antidiscrimination law.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate the physical and mental impairments of otherwise qualified handicapped individuals, provided the accommodation can be made without creating undue business hardship. Such accommodation could include job restructuring or minor alteration of physical facilities. Employers should make applicants and employees aware of their willingness to accommodate.

PRE-EMPLOYMENT INQUIRIES

According to the Wisconsin DILH, employers may ask applicants about their "health status" if the inquiry is clearly relevant to the work to be performed and the employer also makes known its willingness to accommodate.

ENFORCEMENT

The Wisconsin Department of Industry, Labor, and Human Relations enforces the Act, and can be contacted at:
Equal Rights Division
201 E. Washington Avenue
P.O. Box 8928
Madison, WI 53708
(608) 266-6860

WYOMING

SUMMARY

The Wyoming Fair Employment Practices Act of 1965 prohibits discrimination in employment against qualified handicapped individuals (WY Stat. Sec. 27-9-101, *et seq.*). The law applies to employers with two or more employees.

Handicap defined. Handicap is defined as:

- A physical or mental impairment that substantially limits one or more major life activities
- A record of such an impairment
- Being regarded as having such an impairment.

Qualified handicapped individuals. Qualified handicapped individuals are those who can perform the essential functions of the job in question with reasonable accommodation.

REASONABLE ACCOMMODATION

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified handicapped applicant or employee, unless to do so would impose an undue business hardship. Such accommodation may include making facilities accessible to the handicapped, job restructuring, modifying work schedules or equipment, and other similar actions.

SPECIFIC HANDICAPS

Acquired Immune Deficiency Syndrome (AIDS). AIDS may be protected as a handicap under the law.

Drug and alcohol addiction. Drug and alcohol abusers may also be protected.

ENFORCEMENT

The Wyoming Fair Employment Commission enforces the Fair Employment Practices Act. The Commission has the authority to:

- Initiate, receive, and investigate discrimination complaints
- Issue subpoenas
- Hold hearings and issue administrative decisions
- Enforce its decisions in state court.

FURTHER INFORMATION

For further information, contact:

Fair Employment Commission
Hathaway Building
Cheyenne, WY 82002
(307) 777-7261

DISCRIMINATION

The **Rehabilitation Act of 1973** generally prohibits employment practices that discriminate on the basis of disability. The Act has two principal sections. Section 503 covers federal contractors with a single contract for more than \$2,500; Section 504 covers recipients of federal financial assistance, for example, most schools, libraries, and local governments.

Affirmative action under Section 503. Section 503 also requires most government contractors to take affirmative action to employ the handicapped. (This requirement does not apply to those covered under Section 504.) This means that any covered employer must, among other things, take affirmative action to employ and promote disabled workers, post a notice advising employees of the employer's affirmative action obligations, notify labor unions of the affirmative action commitment, and include an affirmative action clause in all subcontracts and purchase orders over \$2,500.

In addition, any employer with 50 or more employees and a contract for more than \$50,000 must have a written affirmative action plan that is updated annually and must invite all applicants and employees to identify themselves as disabled if they want to be protected by the Rehabilitation Act.

Americans With Disabilities Act of 1990 (ADA). Among other things, the ADA prohibits discrimination in *private* employment based on disability. For employers with 25 or more employees, the Act's employment provisions take effect on July 26, 1992; employers with 15 or more employees will become covered two years after that, on July 26, 1994.

Note: We sometimes use the term "handicapped" to mean "disabled." Readers should think of the two as interchangeable.

DISABILITY DEFINED

The Rehabilitation Act and the ADA both consider an individual to be disabled if he or she has a physical or mental impairment that substantially limits one or more life activities, has a record of such an impairment, or is regarded as having such an impairment. The Equal Employment Opportunity Commission (EEOC) has interpreted "impairment" to include any physiological disorder or condition, cosmetic disfigurement, anatomical loss, or any mental or psychological disorder.

Acquired Immune Deficiency Syndrome (AIDS). AIDS is considered to be a disability under both the Rehabilitation Act and the ADA.

Alcohol and drugs. Individuals who have an alcohol abuse problem are protected under the Rehabilitation Act, provided they can perform their job duties safely and effectively, while the ADA provides that an employer may hold an alcoholic employee to the same qualifications and job performance standards as other employees. The ADA also specifically excludes current illegal drug use as a disability; an individual who has had a drug problem but is no longer using drugs illegally is protected, provided he or she has completed or is participating in a supervised rehabilitation program. The Rehabilitation Act had included drug addiction as a disability, but was amended by the ADA and now treats drug addiction as does the ADA.

REASONABLE ACCOMMODATION

Employers are required to reasonably accommodate known disabilities, unless to do so would impose an undue hardship; this is generally interpreted to mean significant difficulty or expense. According to a number of sources, possible accommodations include part-time or modified work schedules, job restructuring, buying or modifying equipment, and providing readers and interpreters.

ENFORCEMENT

The Office of Federal Contract Compliance Programs enforces Section 503 of the Rehabilitation Act; the departments of Health and Human Services and Education enforce Section 504. The EEOC will be responsible for enforcing the ADA. The individual who thinks that he or she has been a victim of discrimination under one of these

Handicaps/Disabilities

NATIONAL (continued)

provisions may file a complaint with the appropriate agency. An individual with a complaint under Section 504 may also bring a private lawsuit.

PHYSICAL EXAMINATIONS

The ADA allows an employer to require a physical exam only after an offer of employment has been made and only if the exam is given to all potential employees in the same job category. Drug tests are not classified as a physical exam, and so may be given at any time (subject to an employer's state law requirements).

PRE-EMPLOYMENT INQUIRIES

The ADA allows an employer to ask *only* whether an applicant can perform the job duties in question. Questions about specific disabilities or the nature and extent of any disability are not lawful under the ADA.



Appendix B

Federal Requirements

Americans With Disabilities Act of 1990	App. B-3
Technical Assistance Plan for the ADA	App. B-55
Equal Employment Opportunity for Individuals With Disabilities	App. B-73
Nondiscrimination on the Basis of Disability in State and Local Government Services	App. B-113
Nondiscrimination On the Basis of Disability by Public Accommodations and in Commercial Facilities	App. B-143
ADA Accessibility Guidelines for Buildings and Facilities	App. B-207
Transportation for Individuals With Disabilities	App. B-245
U.S. Supreme Court Case: <i>School Board of Nassau County, Florida, et al. v. Arline</i>	App. B-277

PUBLIC LAW 101-336 [S. 933]; July 26, 1990

AMERICANS WITH DISABILITIES ACT OF 1990

*For Legislative History of Act, see Report for P.L. 101-336
in U.S.C.C. & A.N. Legislative History Section.*

An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Americans with Disabilities Act of 1990".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purposes.
- Sec. 3. Definitions.

TITLE I—EMPLOYMENT

- Sec. 101. Definitions.
- Sec. 102. Discrimination.
- Sec. 103. Defenses.
- Sec. 104. Illegal use of drugs and alcohol.
- Sec. 105. Posting notices.
- Sec. 106. Regulations.
- Sec. 107. Enforcement.
- Sec. 108. Effective date.

TITLE II—PUBLIC SERVICES

Subtitle A—Prohibition Against Discrimination and Other Generally Applicable Provisions

- Sec. 201. Definition.
- Sec. 202. Discrimination.
- Sec. 203. Enforcement.
- Sec. 204. Regulations.
- Sec. 205. Effective date.

Subtitle B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

PART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

- Sec. 221. Definitions.
- Sec. 222. Public entities operating fixed route systems.
- Sec. 223. Paratransit as a complement to fixed route service.
- Sec. 224. Public entity operating a demand responsive system.
- Sec. 225. Temporary relief where lifts are unavailable.
- Sec. 226. New facilities.
- Sec. 227. Alterations of existing facilities.
- Sec. 228. Public transportation programs and activities in existing facilities and one car per train rule.
- Sec. 229. Regulations.
- Sec. 230. Interim accessibility requirements.
- Sec. 231. Effective date.

PART II—PUBLIC TRANSPORTATION BY INTERCITY AND COMMUTER RAIL

- Sec. 241. Definitions.
- Sec. 242. Intercity and commuter rail actions considered discriminatory.
- Sec. 243. Conformance of accessibility standards.

- Sec. 244. Regulations.
- Sec. 245. Interim accessibility requirements.
- Sec. 246. Effective date.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

- Sec. 301. Definitions.
- Sec. 302. Prohibition of discrimination by public accommodations.
- Sec. 303. New construction and alterations in public accommodations and commercial facilities.
- Sec. 304. Prohibition of discrimination in specified public transportation services provided by private entities.
- Sec. 305. Study.
- Sec. 306. Regulations.
- Sec. 307. Exemptions for private clubs and religious organizations.
- Sec. 308. Enforcement.
- Sec. 309. Examinations and courses.
- Sec. 310. Effective date.

TITLE IV—TELECOMMUNICATIONS

- Sec. 401. Telecommunications relay services for hearing-impaired and speech-impaired individuals.
- Sec. 402. Closed-captioning of public service announcements.

TITLE V—MISCELLANEOUS PROVISIONS

- Sec. 501. Construction.
- Sec. 502. State immunity.
- Sec. 503. Prohibition against retaliation and coercion.
- Sec. 504. Regulations by the Architectural and Transportation Barriers Compliance Board.
- Sec. 505. Attorney's fees.
- Sec. 506. Technical assistance.
- Sec. 507. Federal wilderness areas.
- Sec. 508. Transvestites.
- Sec. 509. Coverage of Congress and the agencies of the legislative branch.
- Sec. 510. Illegal use of drugs.
- Sec. 511. Definitions.
- Sec. 512. Amendments to the Rehabilitation Act.
- Sec. 513. Alternative means of dispute resolution.
- Sec. 514. Severability.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies,

failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) PURPOSE.—It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) **AUXILIARY AIDS AND SERVICES.**—The term “auxiliary aids and services” includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices;

and

(D) other similar services and actions.

(2) **DISABILITY.**—The term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) **STATE.**—The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I—EMPLOYMENT

SEC. 101. DEFINITIONS.

As used in this title:

(1) **COMMISSION.**—The term “Commission” means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) **COVERED ENTITY.**—The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **DIRECT THREAT.**—The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **EMPLOYEE.**—The term “employee” means an individual employed by an employer.

(5) **EMPLOYER.**—

(A) **IN GENERAL.**—The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **EXCEPTIONS.**—The term “employer” does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) **ILLEGAL USE OF DRUGS.**—

(A) **IN GENERAL.**—The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) **DRUGS.**—The term “drug” means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) **PERSON, ETC.**—The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) **QUALIFIED INDIVIDUAL WITH A DISABILITY.**—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) **REASONABLE ACCOMMODATION.**—The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **UNDUE HARDSHIP.**—

(A) **IN GENERAL.**—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **FACTORS TO BE CONSIDERED.**—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

SEC. 102. DISCRIMINATION.

(a) **GENERAL RULE.**—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compen-

sation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.—As used in subsection (a), the term “discriminate” includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) **PREEMPLOYMENT.**—

(A) **PROHIBITED EXAMINATION OR INQUIRY.**—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) **ACCEPTABLE INQUIRY.**—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) **EMPLOYMENT ENTRANCE EXAMINATION.**—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) **EXAMINATION AND INQUIRY.**—

(A) **PROHIBITED EXAMINATIONS AND INQUIRIES.**—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **ACCEPTABLE EXAMINATIONS AND INQUIRIES.**—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) **REQUIREMENT.**—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

SEC. 103. DEFENSES.

(a) **IN GENERAL.**—It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity,

and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) **QUALIFICATION STANDARDS.**—The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) **RELIGIOUS ENTITIES.**—

(1) **IN GENERAL.**—This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) **RELIGIOUS TENETS REQUIREMENT.**—Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) **LIST OF INFECTIOUS AND COMMUNICABLE DISEASES.**—

(1) **IN GENERAL.**—The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) **APPLICATIONS.**—In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) **CONSTRUCTION.**—Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

SEC. 104. ILLEGAL USE OF DRUGS AND ALCOHOL.

(a) **QUALIFIED INDIVIDUAL WITH A DISABILITY.**—For purposes of this title, the term “qualified individual with a disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **RULES OF CONSTRUCTION.**—Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) **AUTHORITY OF COVERED ENTITY.**—A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are

employed in such positions (as defined in the regulations of the Department of Transportation).

(d) DRUG TESTING.—

(1) **IN GENERAL.**—For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) **CONSTRUCTION.**—Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) **TRANSPORTATION EMPLOYEES.**—Nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c).

SEC. 105. POSTING NOTICES.

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SEC. 106. REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

SEC. 107. ENFORCEMENT.

(a) **POWERS, REMEDIES, AND PROCEDURES.**—The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

(b) **COORDINATION.**—The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and

part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act.

SEC. 108. EFFECTIVE DATE.

This title shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

Subtitle A—Prohibition Against Discrimination and Other Generally Applicable Provisions

SEC. 201. DEFINITION.

As used in this title:

(1) **PUBLIC ENTITY.**—The term “public entity” means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

(2) **QUALIFIED INDIVIDUAL WITH A DISABILITY.**—The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

SEC. 202. DISCRIMINATION.

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

SEC. 203. ENFORCEMENT.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

SEC. 204. REGULATIONS.

(a) **IN GENERAL.**—Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244.

(b) **RELATIONSHIP TO OTHER REGULATIONS.**—Except for “program accessibility, existing facilities”, and “communications”, regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to “program accessibility, existing facilities”, and “communications”, such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) **STANDARDS.**—Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act.

SEC. 205. EFFECTIVE DATE.

(a) **GENERAL RULE.**—Except as provided in subsection (b), this subtitle shall become effective 18 months after the date of enactment of this Act.

(b) **EXCEPTION.**—Section 204 shall become effective on the date of enactment of this Act.

Subtitle B—Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

PART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

SEC. 221. DEFINITIONS.

As used in this part:

(1) **DEMAND RESPONSIVE SYSTEM.**—The term “demand responsive system” means any system of providing designated public transportation which is not a fixed route system.

(2) **DESIGNATED PUBLIC TRANSPORTATION.**—The term “designated public transportation” means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) **FIXED ROUTE SYSTEM.**—The term “fixed route system” means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) **OPERATES.**—The term “operates”, as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) **PUBLIC SCHOOL TRANSPORTATION.**—The term “public school transportation” means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) **SECRETARY.**—The term “Secretary” means the Secretary of Transportation.

SEC. 222. PUBLIC ENTITIES OPERATING FIXED ROUTE SYSTEMS.

(a) **PURCHASE AND LEASE OF NEW VEHICLES.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following the effective date of this subsection and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) **PURCHASE AND LEASE OF USED VEHICLES.**—Subject to subsection (c)(1), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease, after the 30th day following the effective date of this subsection, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) **REMANUFACTURED VEHICLES.**—

(1) **GENERAL RULE.**—Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following the effective date of this subsection; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) **EXCEPTION FOR HISTORIC VEHICLES.**—

(A) **GENERAL RULE.**—If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph

(1) and which do not significantly alter the historic character of such vehicle.

(B) **VEHICLES OF HISTORIC CHARACTER DEFINED BY REGULATIONS.**—For purposes of this paragraph and section 228(b), a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

SEC. 223. PARATRANSIT AS A COMPLEMENT TO FIXED ROUTE SERVICE.

(a) **GENERAL RULE.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) **ISSUANCE OF REGULATIONS.**—Not later than 1 year after the effective date of this subsection, the Secretary shall issue final regulations to carry out this section.

(c) **REQUIRED CONTENTS OF REGULATIONS.**—

(1) **ELIGIBLE RECIPIENTS OF SERVICE.**—The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying

the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) **SERVICE AREA.**—The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) **SERVICE CRITERIA.**—Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) **UNDUE FINANCIAL BURDEN LIMITATION.**—The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) **ADDITIONAL SERVICES.**—The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) **PUBLIC PARTICIPATION.**—The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) **PLANS.**—The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after the effective date of this subsection, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) **PROVISION OF SERVICES BY OTHERS.**—The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) OTHER PROVISIONS.—The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) REVIEW OF PLAN.—

(1) GENERAL RULE.—The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) DISAPPROVAL.—If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) MODIFICATION OF DISAPPROVED PLAN.—Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) DISCRIMINATION DEFINED.—As used in subsection (a), the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7);

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3);

(3) submission to the Secretary of a modified plan under subsection (d)(3) which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) STATUTORY CONSTRUCTION.—Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

SEC. 224. PUBLIC ENTITY OPERATING A DEMAND RESPONSIVE SYSTEM.

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable

by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

SEC. 225. TEMPORARY RELIEF WHERE LIFTS ARE UNAVAILABLE.

(a) GRANTING.—With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 222(a) or 224 to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) DURATION AND NOTICE TO CONGRESS.—Any relief granted under subsection (a) shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) FRAUDULENT APPLICATION.—If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

SEC. 226. NEW FACILITIES.

For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

SEC. 227. ALTERATIONS OF EXISTING FACILITIES.

(a) GENERAL RULE.—With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or

access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) SPECIAL RULE FOR STATIONS.—

(1) **GENERAL RULE.**—For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) RAPID RAIL AND LIGHT RAIL KEY STATIONS.—

(A) **ACCESSIBILITY.**—Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on the effective date of this paragraph.

(B) **EXTENSION FOR EXTRAORDINARILY EXPENSIVE STRUCTURAL CHANGES.**—The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following the date of the enactment of this Act at least $\frac{1}{3}$ of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) **PLANS AND MILESTONES.**—The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

SEC. 228. PUBLIC TRANSPORTATION PROGRAMS AND ACTIVITIES IN EXISTING FACILITIES AND ONE CAR PER TRAIN RULE.

(a) PUBLIC TRANSPORTATION PROGRAMS AND ACTIVITIES IN EXISTING FACILITIES.—

(1) **IN GENERAL.**—With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C.

794), for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) **EXCEPTION.**—Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 227(a) (relating to alterations) or section 227(b) (relating to key stations).

(3) **UTILIZATION.**—Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) ONE CAR PER TRAIN RULE.—

(1) **GENERAL RULE.**—Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) **HISTORIC TRAINS.**—In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 222(c)(1) and which do not significantly alter the historic character of such vehicle.

SEC. 229. REGULATIONS.

(a) **IN GENERAL.**—Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part (other than section 223).

(b) **STANDARDS.**—The regulations issued under this section and section 223 shall include standards applicable to facilities and vehicles covered by this subtitle. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of this Act.

SEC. 230. INTERIM ACCESSIBILITY REQUIREMENTS.

If final regulations have not been issued pursuant to section 229, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of

such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 226 and 227, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

SEC. 231. EFFECTIVE DATE.

(a) **GENERAL RULE.**—Except as provided in subsection (b), this part shall become effective 18 months after the date of enactment of this Act.

(b) **EXCEPTION.**—Sections 222, 223 (other than subsection (a)), 224, 225, 227(b), 228(b), and 229 shall become effective on the date of enactment of this Act.

PART II—PUBLIC TRANSPORTATION BY INTERCITY AND COMMUTER RAIL

SEC. 241. DEFINITIONS.

As used in this part:

(1) **COMMUTER AUTHORITY.**—The term “commuter authority” has the meaning given such term in section 103(8) of the Rail Passenger Service Act (45 U.S.C. 502(8)).

(2) **COMMUTER RAIL TRANSPORTATION.**—The term “commuter rail transportation” has the meaning given the term “commuter service” in section 103(9) of the Rail Passenger Service Act (45 U.S.C. 502(9)).

(3) **INTERCITY RAIL TRANSPORTATION.**—The term “intercity rail transportation” means transportation provided by the National Railroad Passenger Corporation.

(4) **RAIL PASSENGER CAR.**—The term “rail passenger car” means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) **RESPONSIBLE PERSON.**—The term “responsible person” means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) **STATION.**—The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

SEC. 242. INTERCITY AND COMMUTER RAIL ACTIONS CONSIDERED DISCRIMINATORY.

(a) INTERCITY RAIL TRANSPORTATION.—

(1) **ONE CAR PER TRAIN RULE.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 244, as soon as practicable, but in no event later than 5 years after the date of enactment of this Act.

(2) NEW INTERCITY CARS.—

(A) **GENERAL RULE.**—Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after the effective date of this section, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(B) **SPECIAL RULE FOR SINGLE-LEVEL PASSENGER COACHES FOR INDIVIDUALS WHO USE WHEELCHAIRS.**—Single-level passenger coaches shall be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) **SPECIAL RULE FOR SINGLE-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS.**—Single-level dining cars shall not be required to—

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) SPECIAL RULE FOR BI-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS.—Bi-level dining cars shall not be required to—

- (i) be able to be entered by an individual who uses a wheelchair;
- (ii) have space to park and secure a wheelchair;
- (iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or
- (iv) have a restroom usable by an individual who uses a wheelchair.

(3) ACCESSIBILITY OF SINGLE-LEVEL COACHES.—

(A) GENERAL RULE.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches—

(i) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 5 years after the date of enactment of this Act; and

(ii) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 10 years after the date of enactment of this Act.

(B) LOCATION.—Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) LIMITATION.—Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) OTHER ACCESSIBILITY FEATURES.—Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) FOOD SERVICE.—

(A) **SINGLE-LEVEL DINING CARS.**—On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after the date of enactment of this Act, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) **BI-LEVEL DINING CARS.**—On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after the date of enactment of this Act, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) **COMMUTER RAIL TRANSPORTATION.**—

(1) **ONE CAR PER TRAIN RULE.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 244, as soon as practicable, but in no event later than 5 years after the date of enactment of this Act.

(2) **NEW COMMUTER RAIL CARS.**—

(A) **GENERAL RULE.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to

purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after the effective date of this section, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(B) ACCESSIBILITY.—For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) USED RAIL CARS.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(d) REMANUFACTURED RAIL CARS.—

(1) REMANUFACTURING.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(2) PURCHASE OR LEASE.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) STATIONS.—

(1) NEW STATIONS.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(2) EXISTING STATIONS.—

(A) FAILURE TO MAKE READILY ACCESSIBLE.—

(i) **GENERAL RULE.**—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(ii) **PERIOD FOR COMPLIANCE.—**

(I) **INTERCITY RAIL.**—All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act.

(II) **COMMUTER RAIL.**—Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years after the date of enactment of this Act in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) **DESIGNATION OF KEY STATIONS.**—Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) **PLANS AND MILESTONES.**—The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) REQUIREMENT WHEN MAKING ALTERATIONS.—

(i) **GENERAL RULE.**—It shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the

maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) ALTERATIONS TO A PRIMARY FUNCTION AREA.—It shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) REQUIRED COOPERATION.—It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this Act.

SEC. 243. CONFORMANCE OF ACCESSIBILITY STANDARDS.

Accessibility standards included in regulations issued under this part shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 504(a) of this Act.

SEC. 244. REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part.

SEC. 245. INTERIM ACCESSIBILITY REQUIREMENTS.

(a) STATIONS.—If final regulations have not been issued pursuant to section 244, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is

issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities as required under section 242(e), except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) **RAIL PASSENGER CARS.**—If final regulations have not been issued pursuant to section 244, a person shall be considered to have complied with the requirements of section 242 (a) through (d) that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 504(a) of this Act) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this part and are in effect at the time such design is substantially completed.

SEC. 246. EFFECTIVE DATE.

(a) **GENERAL RULE.**—Except as provided in subsection (b), this part shall become effective 18 months after the date of enactment of this Act.

(b) **EXCEPTION.**—Sections 242 and 244 shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

SEC. 301. DEFINITIONS.

As used in this title:

(1) **COMMERCE.**—The term “commerce” means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) **COMMERCIAL FACILITIES.**—The term “commercial facilities” means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 242 or covered under this title, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) **DEMAND RESPONSIVE SYSTEM.**—The term “demand responsive system” means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) **FIXED ROUTE SYSTEM.**—The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) **OVER-THE-ROAD BUS.**—The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) **PRIVATE ENTITY.**—The term "private entity" means any entity other than a public entity (as defined in section 201(1)).

(7) **PUBLIC ACCOMMODATION.**—The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) **RAIL AND RAILROAD.**—The terms "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

(9) **READILY ACHIEVABLE.**—The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

(A) the nature and cost of the action needed under this Act;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the

impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) SPECIFIED PUBLIC TRANSPORTATION.—The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) VEHICLE.—The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 242 or covered under this title.

SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) CONSTRUCTION.—

(1) GENERAL PROHIBITION.—

(A) ACTIVITIES.—

(i) DENIAL OF PARTICIPATION.—It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) PARTICIPATION IN UNEQUAL BENEFIT.—It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) SEPARATE BENEFIT.—It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privi-

lege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) **INDIVIDUAL OR CLASS OF INDIVIDUALS.**—For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) **INTEGRATED SETTINGS.**—Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) **OPPORTUNITY TO PARTICIPATE.**—Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) **ADMINISTRATIVE METHODS.**—An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) **ASSOCIATION.**—It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) **SPECIFIC PROHIBITIONS.**—

(A) **DISCRIMINATION.**—For purposes of subsection (a), discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fun-

damentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) FIXED ROUTE SYSTEM.—

(i) **ACCESSIBILITY.**—It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 304 to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) **EQUIVALENT SERVICE.**—If a private entity which operates a fixed route system and which is not subject to section 304 purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) DEMAND RESPONSIVE SYSTEM.—For purposes of subsection (a), discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 304 to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily

accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) OVER-THE-ROAD BUSES.—

(i) **LIMITATION ON APPLICABILITY.**—Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) **ACCESSIBILITY REQUIREMENTS.**—For purposes of subsection (a), discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 306(a)(2) by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) **SPECIFIC CONSTRUCTION.**—Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

SEC. 303. NEW CONSTRUCTION AND ALTERATIONS IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES.

(a) **APPLICATION OF TERM.**—Except as provided in subsection (b), as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and

scope (as determined under criteria established by the Attorney General).

(b) **ELEVATOR.**—Subsection (a) shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

SEC. 304. PROHIBITION OF DISCRIMINATION IN SPECIFIED PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) **GENERAL RULE.**—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) **CONSTRUCTION.**—For purposes of subsection (a), discrimination includes—

(1) the imposition or application by a entity described in subsection (a) of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to—

(A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

(C) remove barriers consistent with the requirements of section 302(b)(2)(A) and with the requirements of section 303(a)(2);

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4)(A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 306(a)(2); and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following

the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) HISTORICAL OR ANTIQUATED CARS.—

(1) EXCEPTION.—To the extent that compliance with subsection (b)(2)(C) or (b)(7) would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970, such compliance shall not be required.

(2) DEFINITION.—As used in this subsection, the term “historical or antiquated rail passenger car” means a rail passenger car—

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which—

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

SEC. 305. STUDY.

(a) PURPOSES.—The Office of Technology Assessment shall undertake a study to determine—

(1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) CONTENTS.—The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 304(b)(4) and 306(a)(2), are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) **ADVISORY COMMITTEE.**—In conducting the study required by subsection (a), the Office of Technology Assessment shall establish an advisory committee, which shall consist of—

(1) members selected from among private operators and manufacturers of over-the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) **DEADLINE.**—The study required by subsection (a), along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and Congress within 36 months after the date of the enactment of this Act. If the President determines that compliance with the regulations issued pursuant to section 306(a)(2)(B) on or before the applicable deadlines specified in section 306(a)(2)(B) will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) **REVIEW.**—In developing the study required by subsection (a), the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792). The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d).

SEC. 306. REGULATIONS.

(a) **TRANSPORTATION PROVISIONS.**—

(1) **GENERAL RULE.**—Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections

302(b)(2) (B) and (C) and to carry out section 304 (other than subsection (b)(4)).

(2) SPECIAL RULES FOR PROVIDING ACCESS TO OVER-THE-ROAD BUSES.—

(A) INTERIM REQUIREMENTS.—

(i) **ISSUANCE.**—Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 304(b)(4) and 302(b)(2)(D)(ii) that require each private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) **EFFECTIVE PERIOD.**—The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) FINAL REQUIREMENT.—

(i) **REVIEW OF STUDY AND INTERIM REQUIREMENTS.**—The Secretary shall review the study submitted under section 305 and the regulations issued pursuant to subparagraph (A).

(ii) **ISSUANCE.**—Not later than 1 year after the date of the submission of the study under section 305, the Secretary shall issue in an accessible format new regulations to carry out sections 304(b)(4) and 302(b)(2)(D)(ii) that require, taking into account the purposes of the study under section 305 and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) **EFFECTIVE PERIOD.**—Subject to section 305(d), the regulations issued pursuant to this subparagraph shall take effect—

(I) with respect to small providers of transportation (as defined by the Secretary), 7 years after the date of the enactment of this Act; and

(II) with respect to other providers of transportation, 6 years after such date of enactment.

(C) LIMITATION ON REQUIRING INSTALLATION OF ACCESSIBLE RESTROOMS.—The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) STANDARDS.—The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 302(b)(2) and 304.

(b) OTHER PROVISIONS.—Not later than 1 year after the date of the enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this title not

referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

(c) **CONSISTENCY WITH ATBCB GUIDELINES.**—Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of this Act.

(d) **INTERIM ACCESSIBILITY STANDARDS.**—

(1) **FACILITIES.**—If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 303, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) **VEHICLES AND RAIL PASSENGER CARS.**—If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this title, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 504(a) of this Act) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this title and are in effect at the time such design is substantially completed.

SEC. 307. EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANIZATIONS.

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) or to religious organizations or entities controlled by religious organizations, including places of worship.

SEC. 308. ENFORCEMENT.

(a) **IN GENERAL.**—

(1) **AVAILABILITY OF REMEDIES AND PROCEDURES.**—The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of

section 303. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(2) **INJUNCTIVE RELIEF.**—In the case of violations of sections 302(b)(2)(A)(iv) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b) ENFORCEMENT BY THE ATTORNEY GENERAL.—

(1) DENIAL OF RIGHTS.—

(A) DUTY TO INVESTIGATE.—

(i) **IN GENERAL.**—The Attorney General shall investigate alleged violations of this title, and shall undertake periodic reviews of compliance of covered entities under this title.

(ii) **ATTORNEY GENERAL CERTIFICATION.**—On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this Act for the accessibility and usability of covered facilities under this title. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this Act.

(B) POTENTIAL VIOLATION.—If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this title; or

(ii) any person or group of persons has been discriminated against under this title and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) AUTHORITY OF COURT.—In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this title—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

- (i) not exceeding \$50,000 for a first violation; and
- (ii) not exceeding \$100,000 for any subsequent violation.

(3) **SINGLE VIOLATION.**—For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) **PUNITIVE DAMAGES.**—For purposes of subsection (b)(2)(B), the term “monetary damages” and “such other relief” does not include punitive damages.

(5) **JUDICIAL CONSIDERATION.**—In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

SEC. 309. EXAMINATIONS AND COURSES.

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SEC. 310. EFFECTIVE DATE.

(a) **GENERAL RULE.**—Except as provided in subsections (b) and (c), this title shall become effective 18 months after the date of the enactment of this Act.

(b) **CIVIL ACTIONS.**—Except for any civil action brought for a violation of section 303, no civil action shall be brought for any act or omission described in section 302 which occurs—

(1) during the first 6 months after the effective date, against businesses that employ 25 or fewer employees and have gross receipts of \$1,000,000 or less; and

(2) during the first year after the effective date, against businesses that employ 10 or fewer employees and have gross receipts of \$500,000 or less.

(c) **EXCEPTION.**—Sections 302(a) for purposes of section 302(b)(2) (B) and (C) only, 304(a) for purposes of section 304(b)(3) only, 304(b)(3), 305, and 306 shall take effect on the date of the enactment of this Act.

TITLE IV—TELECOMMUNICATIONS

SEC. 401. TELECOMMUNICATIONS RELAY SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

(a) TELECOMMUNICATIONS.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

"(a) DEFINITIONS.—As used in this section—

"(1) COMMON CARRIER OR CARRIER.—The term 'common carrier' or 'carrier' includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b).

"(2) TDD.—The term 'TDD' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

"(3) TELECOMMUNICATIONS RELAY SERVICES.—The term 'telecommunications relay services' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

"(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES.—

"(1) IN GENERAL.—In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

"(2) USE OF GENERAL AUTHORITY AND REMEDIES.—For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this Act by a common carrier engaged in interstate communication.

"(c) PROVISION OF SERVICES.—Each common carrier providing telephone voice transmission services shall, not later than 3 years after the date of enactment of this section, provide in compliance with the

regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations—

"(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d); or

"(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) for such State.

"(d) REGULATIONS.—

"(1) IN GENERAL.—The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that—

"(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

"(B) establish minimum standards that shall be met in carrying out subsection (c);

"(C) require that telecommunications relay services operate every day for 24 hours per day;

"(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

"(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

"(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

"(G) prohibit relay operators from intentionally altering a relayed conversation.

"(2) TECHNOLOGY.—The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.

"(3) JURISDICTIONAL SEPARATION OF COSTS.—

"(A) IN GENERAL.—Consistent with the provisions of section 410 of this Act, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

"(B) RECOVERING COSTS.—Such regulations shall generally provide that costs caused by interstate telecommunications

relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

"(e) ENFORCEMENT.—

"(1) IN GENERAL.—Subject to subsections (f) and (g), the Commission shall enforce this section.

"(2) COMPLAINT.—The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

"(f) CERTIFICATION.—

"(1) STATE DOCUMENTATION.—Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

"(2) REQUIREMENTS FOR CERTIFICATION.—After review of such documentation, the Commission shall certify the State program if the Commission determines that—

"(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d); and

"(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

"(3) METHOD OF FUNDING.—Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

"(4) SUSPENSION OR REVOCATION OF CERTIFICATION.—The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

"(g) COMPLAINT.—

"(1) REFERRAL OF COMPLAINT.—If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

"(2) JURISDICTION OF COMMISSION.—After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

"(A) final action under such State program has not been taken on such complaint by such State—

"(i) within 180 days after the complaint is filed with such State; or

"(ii) within a shorter period as prescribed by the regulations of such State; or

"(B) the Commission determines that such State program is no longer qualified for certification under subsection (f)."

(b) CONFORMING AMENDMENTS.—The Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended—

(1) in section 2(b) (47 U.S.C. 152(b)), by striking "section 224" and inserting "sections 224 and 225"; and

(2) in section 221(b) (47 U.S.C. 221(b)), by striking "section 301" and inserting "sections 225 and 301".

SEC. 402. CLOSED-CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

Section 711 of the Communications Act of 1934 is amended to read as follows:

"SEC. 711. CLOSED-CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

"Any television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement. A television broadcast station licensee—

"(1) shall not be required to supply closed captioning for any such announcement that fails to include it; and

"(2) shall not be liable for broadcasting any such announcement without transmitting a closed caption unless the licensee intentionally fails to transmit the closed caption that was included with the announcement."

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. CONSTRUCTION.

(a) IN GENERAL.—Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) RELATIONSHIP TO OTHER LAWS.—Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. Nothing in this Act shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by title I, in transportation covered by title II or III, or in places of public accommodation covered by title III.

(c) INSURANCE.—Titles I through IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms

of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

(d) ACCOMMODATIONS AND SERVICES.—Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

SEC. 502. STATE IMMUNITY.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 503. PROHIBITION AGAINST RETALIATION AND COERCION.

(a) RETALIATION.—No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) INTERFERENCE, COERCION, OR INTIMIDATION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES.—The remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.

SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD.

(a) ISSUANCE OF GUIDELINES.—Not later than 9 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III of this Act.

(b) CONTENTS OF GUIDELINES.—The supplemental guidelines issued under subsection (a) shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) QUALIFIED HISTORIC PROPERTIES.—

(1) IN GENERAL.—The supplemental guidelines issued under subsection (a) shall include procedures and requirements for

alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) **SITES ELIGIBLE FOR LISTING IN NATIONAL REGISTER.**—With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7 (1) and (2) of the Uniform Federal Accessibility Standards.

(3) **OTHER SITES.**—With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1) (b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

SEC. 505. ATTORNEY'S FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

SEC. 506. TECHNICAL ASSISTANCE.

(a) PLAN FOR ASSISTANCE.—

(1) **IN GENERAL.**—Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this Act, and other Federal agencies, in understanding the responsibility of such entities and agencies under this Act.

(2) **PUBLICATION OF PLAN.**—The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act).

(b) **AGENCY AND PUBLIC ASSISTANCE.**—The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) IMPLEMENTATION.—

(1) **RENDERING ASSISTANCE.**—Each Federal agency that has responsibility under paragraph (2) for implementing this Act may render technical assistance to individuals and institutions that have rights or duties under the respective title or titles for which such agency has responsibility.

(2) IMPLEMENTATION OF TITLES.—

(A) **TITLE 1.**—The Equal Employment Opportunity Commission and the Attorney General shall implement the

plan for assistance developed under subsection (a), for title I.

(B) TITLE II.—

(i) **SUBTITLE A.**—The Attorney General shall implement such plan for assistance for subtitle A of title II.

(ii) **SUBTITLE B.**—The Secretary of Transportation shall implement such plan for assistance for subtitle B of title II.

(C) **TITLE III.**—The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III, except for section 304, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) **TITLE IV.**—The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) **TECHNICAL ASSISTANCE MANUALS.**—Each Federal agency that has responsibility under paragraph (2) for implementing this Act shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this Act no later than six months after applicable final regulations are published under titles I, II, III, and IV.

(d) GRANTS AND CONTRACTS.—

(1) **IN GENERAL.**—Each Federal agency that has responsibility under subsection (c)(2) for implementing this Act may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this Act. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or grants described in this paragraph.

(2) **DISSEMINATION OF INFORMATION.**—Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) **FAILURE TO RECEIVE ASSISTANCE.**—An employer, public accommodation, or other entity covered under this Act shall not be excused from compliance with the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

SEC. 507. FEDERAL WILDERNESS AREAS.

(a) **STUDY.**—The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) **SUBMISSION OF REPORT.**—Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.

(c) **SPECIFIC WILDERNESS ACCESS.**—

(1) **IN GENERAL.**—Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) **DEFINITION.**—For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

SEC. 508. TRANSVESTITES.

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. 509. COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) **COVERAGE OF THE SENATE.**—

(1) **COMMITMENT TO RULE XLII.**—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate which provides as follows:

"No member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

(2) **APPLICATION TO SENATE EMPLOYMENT.**—The rights and protections provided pursuant to this Act, the Civil Rights Act of 1990 (S. 2104, 101st Congress), the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate.

(3) **INVESTIGATION AND ADJUDICATION OF CLAIMS.**—All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(4) **RIGHTS OF EMPLOYEES.**—The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the Acts referred to in paragraph (2).

(5) **APPLICABLE REMEDIES.**—When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent

practicable apply the same remedies applicable to all other employees covered by the Acts referred to in paragraph (2). Such remedies shall apply exclusively.

(6) MATTERS OTHER THAN EMPLOYMENT.—

(A) IN GENERAL.—The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) REMEDIES.—The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) PROPOSED REMEDIES AND PROCEDURES.—For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(7) EXERCISE OF RULEMAKING POWER.—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraph (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES.—

(1) IN GENERAL.—Notwithstanding any other provision of this Act or of law, the purposes of this Act shall, subject to paragraphs (2) and (3), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

(A) APPLICATION.—The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.—

(i) IN GENERAL.—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION.—The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER.—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(3) MATTERS OTHER THAN EMPLOYMENT.—

(A) **IN GENERAL.**—The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the House of Representatives regarding matters other than employment.

(B) **REMEDIES.**—The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) **APPROVAL.**—For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Speaker of the House of Representatives. The remedies and procedures shall be effective upon the approval of the Speaker, after consultation with the House Office Building Commission.

(c) INSTRUMENTALITIES OF CONGRESS.—

(1) **IN GENERAL.**—The rights and protections under this Act shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) **ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.**—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) **REPORT TO CONGRESS.**—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) **DEFINITION OF INSTRUMENTALITIES.**—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, and the United States Botanic Garden.

(5) **CONSTRUCTION.**—Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

SEC. 510. ILLEGAL USE OF DRUGS.

(a) **IN GENERAL.**—For purposes of this Act, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **RULES OF CONSTRUCTION.**—Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) **HEALTH AND OTHER SERVICES.**—Notwithstanding subsection (a) and section 511(b)(3), an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) **DEFINITION OF ILLEGAL USE OF DRUGS.**—

(1) **IN GENERAL.**—The term “illegal use of drugs” means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) **DRUGS.**—The term “drug” means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

SEC. 511. DEFINITIONS.

(a) **HOMOSEXUALITY AND BISEXUALITY.**—For purposes of the definition of “disability” in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

(b) **CERTAIN CONDITIONS.**—Under this Act, the term “disability” shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.

(a) **DEFINITION OF HANDICAPPED INDIVIDUAL.**—Section 7(8) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)) is amended by redesignating subparagraph (C) as subparagraph (D), and by inserting after subparagraph (B) the following subparagraph:

“(CXi) For purposes of title V, the term ‘individual with handicaps’ does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

“(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—

“(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

“(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

“(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

"(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under titles I, II and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

"(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

"(v) For purposes of sections 503 and 504 as such sections relate to employment, the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others."

(b) **DEFINITION OF ILLEGAL DRUGS.**—Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 706) is amended by adding at the end the following new paragraph:

"(22XA) The term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

"(B) The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law."

(c) **CONFORMING AMENDMENTS.**—Section 7(8XB) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8XB)) is amended—

(1) in the first sentence, by striking "Subject to the second sentence of this subparagraph," and inserting "Subject to subparagraphs (C) and (D),"; and

(2) by striking the second sentence.

SEC. 513. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials,

and arbitration, is encouraged to resolve disputes arising under this Act.

SEC. 514. SEVERABILITY.

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

Approved July 26, 1990.

DEPARTMENT OF JUSTICE**Technical Assistance Plan for the
Americans with Disabilities Act of 1990**

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: The Department of Justice has prepared a technical assistance plan for public comment in accordance with the requirements of section 506 of the Americans with Disabilities Act of 1990 (ADA). The purpose of this plan is to explain the strategies that will be followed to assist entities covered by the ADA, individuals with disabilities, Federal agencies, and the general public to understand the rights and responsibilities established by the ADA. This plan was prepared in consultation with the Equal Employment Opportunity Commission, the Department of Transportation, the Architectural and Transportation Barriers Compliance Board, the Federal Communications Commission, the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, the Department of Commerce, and the National Institute on Disability and Rehabilitation Research.

DATES: Comments must be received by January 4, 1991.

ADDRESSES: Comments should be sent to Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Box 66118, Washington, DC 20035-6118.

FOR FURTHER INFORMATION CONTACT:
James D. Bennett, Supervisory Program Analyst, (202) 307-2220 (Voice) and (202) 307-2678 (TDD).

This document is available on request in the following accessible formats:

- Audio tape;
- Large print;
- Braille; and
- Electronic file on computer disk and electronic bulletin board (202) 514-6193.

SUPPLEMENTARY INFORMATION: The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in employment, State and local government operations, public transportation, public accommodations, and telecommunications (42 U.S.C. 12101-12213). The ADA requires that the Department of Justice (DOJ) develop a technical assistance plan to assist entities covered by the ADA, and Federal agencies, to understand their responsibilities under this law. The ADA further requires that DOJ prepare the plan in consultation with the Equal Employment Opportunity Commission, the Department of Transportation, the Architectural and Transportation Barriers Board, and the Federal Communications Commission, and the ADA provides that DOJ may consult the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce. All of these agencies were consulted in the development of the proposed plan, and DOJ also consulted the National Institute on Disability and Rehabilitation Research.

The purpose of this proposed plan is to outline how technical assistance with respect to understanding the ADA will be provided to entities covered by the ADA, individuals with disabilities, and the general public. The proposed plan discusses technical assistance in the areas of employment, public accommodations, transportation, State and local government services, and telecommunications, and the actions that the agencies identified above will undertake to fulfill their statutory responsibilities. We seek comments on all aspects of the plan. Following analysis of the comments received, a final technical assistance plan will be published by January 26, 1991, as required by section 506 of the ADA.

The responsibility for publishing this plan has been delegated by the Attorney General to the Assistant Attorney General for Civil Rights (55 FR 40653) (1990). This proposed technical assistance plan is issued in accordance with the requirements of section 506 of the ADA (Pub. L. 101-336, 104 Stat. 371, 42 U.S.C. 12206).

Dated: November 27, 1990

John R. Dunne,
Assistant Attorney General for Civil Rights.

**Americans with Disabilities Act of 1990:
Proposed Federal Government Technical
Assistance Plan**

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I. Introduction

A. Technical Assistance Provisions of the Americans With Disabilities Act

The Americans with Disabilities Act of 1990 (ADA), which was signed into law by President Bush on July 26, 1990, provides to individuals with disabilities comprehensive civil rights protections that are similar in scope to those provided to individuals on the basis of race, national origin, sex, and religion. The ADA seeks to ensure equal opportunity for individuals with disabilities in employment, public accommodations, public services (including transportation), and telecommunications.

The ADA recognizes the necessity of educating the public about its rights and responsibilities under the Act. Section 506 of the ADA requires the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission (EEOC), the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board (ATBCB), and the Chairman of the Federal Communications Commission (FCC), to develop a plan to assist entities covered under the ADA, as well as other Federal agencies, in understanding their responsibilities under the Act.

The Attorney General is authorized to obtain the assistance of other Federal agencies in preparing the technical assistance plan. These agencies, especially the National Council on Disability (NCD) and the President's Committee on Employment of People with Disabilities (PCEPD), and including the Small Business Administration (SBA) and the Department of Commerce, also have a role in the planning and delivery of technical assistance under the ADA. Other Federal agencies not specifically mentioned in the statute, such as the National Institute on Disability and Rehabilitation Research of the Department of Education, are part of the ADA technical assistance planning and delivery network by virtue either of their mission or their current or planned programs.

The ADA requires the Attorney General to develop the technical assistance plan not later than 180 days after the date of the ADA's enactment, i.e., by not later than January 28, 1991. It is the Department of Justice's (DOJ) intention to publish the final technical assistance plan within the 180 day period established by the ADA. The Attorney General also is required to publish the technical assistance plan for public comment according to the provisions of the Administrative Procedure Act.

This document constitutes the proposed technical assistance plan developed by the Attorney General, in consultation with the above-cited agencies, that is being presented for public review and comment in the *Federal Register*. The period covered by the plan is FY 1991 through FY 1994; however, certain technical assistance activities, such as those carried out under grants and contracts that may be awarded during FY 1994, can be expected to continue into FY 1995 and FY 1996.

It is important to remember that the scope and amount of technical assistance actually provided under the ADA will depend upon the result of the Federal Government's budget preparation and approval process, and subsequent appropriations by Congress. Specific additional appropriations will be required to carry out the assistance and outreach initiatives described in this plan. In the absence of additional appropriations, the technical assistance grants and contracts described in this plan cannot be implemented, and the overall provision of technical assistance necessarily will be limited to minimum levels of dissemination of basic information regarding the ADA's

requirements and compliance techniques.

Four Federal agencies have primary responsibility for implementing the ADA: DOJ, EEOC, DOT, and FCC. The ADA authorizes these agencies, within their respective spheres of responsibility under the ADA, to render technical assistance to individuals and institutions that have rights or duties under the ADA. These agencies are required to publish regulations under title I (employment), title II (public services, including transportation), title III (public accommodations), and title IV (telecommunications). They specifically are required to provide and make available, not later than six months after the publication of these regulations, appropriate technical assistance manuals to individuals or entities with rights or duties under the ADA. However, the Act states that the failure to receive technical assistance or publications required under the Act does not excuse entities covered under the ADA from complying with its provisions.

The four implementing agencies are convinced that, once given information on how to comply with the ADA, covered entities will do so voluntarily. The Federal Government's experience in implementing section 504 of the Rehabilitation Act of 1973, as amended, has demonstrated that a publicized, readily available, comprehensive technical assistance program responsive to the problems and needs of its audience offers many advantages. It reduces misunderstandings regarding rights and responsibilities, facilitates voluntary compliance, and promotes the exchange of information and the development of more effective and less costly methods to address compliance issues. It also avoids an unnecessary reliance on enforcement and litigation mechanisms to achieve compliance.

B. Definition and Description of Technical Assistance

Technical assistance, as used in this plan, refers to the provision of expert advice, and both general and specific information and assistance, to the public and to entities covered by the ADA. The purposes of this technical assistance are twofold: to inform the public (including individuals with rights protected under the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance. Many of the initial strategies and programs described in this plan are directed at providing broad dissemination of basic program information and compliance

requirements. Longer-range activities focus on addressing particular compliance issues and methods.

The technical assistance discussed in this plan will take many forms. It will employ virtually all aspects of communications, including the use of publications, exhibits, videotapes and audiotapes, public service announcements, and electronic bulletin boards. The development and dissemination of this body of information and materials in alternate formats accessible to individuals with disabilities is essential to the ADA technical assistance program.

Technical assistance under the ADA will include presentations at interactive group events such as conferences, workshops, and training programs. It also will include advice to individuals that addresses a specific topic or the resolution of a specific problem, such as can be provided through the use of telephone hotlines, information clearinghouses or on-site experts.

Finally, technical assistance will include a variety of clearinghouse functions in order to benefit from the experiences of covered entities and individuals with disabilities in complying with the ADA. Information systematically will be sought and shared to enhance the development, assessment, and replication of new and improved compliance methods and techniques.

Technical assistance under the ADA will be provided by staff of the four implementing agencies, by staff of other Federal agencies under agreements with the implementing agencies, by individual experts or consultants retained by the implementing agencies, and by associations, groups, or organizations under grant or contract to the implementing agencies. The ADA specifically authorizes the four Federal agencies with implementation responsibilities under the Act to enter into grants and contracts, subject to the availability of appropriations, with individuals, not-for-profit institutions, and associations that represent individuals who have rights or responsibilities under the ADA, and to enter into contracts with for-profit entities.

This plan provides for the extensive use of the skills, knowledge, and experience of trade associations, advocacy groups, and other similar organizations that have existing lines of communications and credibility with covered entities and persons with disabilities. By working with existing networks, whenever feasible, Federal agencies can maximize the resources

devoted to technical assistance. Further, as the Federal Government's experience with section 504 enforcement and compliance has demonstrated, there will be a continuing need for technical assistance beyond the first several years of ADA implementation. By entering into a technical assistance partnership with appropriate national, regional, and "grassroots" organizations, Federal agencies can build the capacity of these organizations to provide technical assistance to their respective constituencies after the period covered by this plan and for as long as needed.

These organizations outside of the Federal Government will be active participants in the identification of the specific audiences that are covered or affected by the ADA's requirements. They will assist in the definition of the differing problems and technical assistance needs of these widely varied audiences. These associations, groups, and organizations also will participate in the development of technical assistance initiatives to address specific compliance problems and issues. In addition, they will participate in the actual delivery of technical assistance. The knowledge, experience, credibility, and existing communications networks and delivery systems that they possess will be a key element in assuring the success of the overall ADA technical assistance program.

The Federal agencies providing technical assistance under this plan recognize the importance of sound planning and evaluation to the development of an effective technical assistance program. They recognize that is important to coordinate their activities to avoid overlap or duplication of efforts. They also recognize the need to share information and evaluate the operation and effectiveness of their respective technical assistance activities.

C. Coordination of Federal Technical Assistance Activities

This plan describes a comprehensive, coordinated Federal multiyear program of technical assistance to promote compliance with the ADA. Although specific program development, management, and evaluation responsibilities rest with DOJ, EEOC, DOT, and FCC, the need remains for government-wide coordination, especially during the FY 1991 through FY 1994 period covered by the plan.

To this end, the Attorney General will establish an ADA Technical Assistance Working Group. This working group will be chaired by DOJ. It will be composed of representatives of the four

implementing agencies (DOJ, EEOC, DOT, and FCC), representatives from the ATBCB, NCD, PCEPD, SBA and Department of Commerce, and representatives from other agencies with ADA technical assistance responsibilities and activities that the Attorney General may identify and invite to participate. The working group will meet at least twice annually to discuss its activities under this plan, to assess the adequacy and effectiveness of technical assistance that is being provided, and to make recommendations to the Attorney General for improved coordination in the planning and delivery of technical assistance under this plan.

The Attorney General will prepare guidelines for the development of annual updates to this ADA Technical Assistance Plan by the agencies represented on the working group. These annual updates will be submitted to the Attorney General by October 1 of each year. The Attorney General also may require other Federal agencies, identified by the working group as having ADA technical assistance responsibilities or programs, to submit technical assistance plans. The technical assistance plans or updates will describe progress made during the past fiscal year to implement the provisions of the ADA and this plan, the results of any assessments or evaluations of technical assistance delivery or innovative methods or procedures to promote compliance, and program initiatives proposed for the current fiscal year.

The Attorney General, based upon the review of agency plans, will prepare an annual report that describes technical assistance provided by or on behalf of the Federal Government in support of the ADA. This report will be issued by December 31 of each year.

D. Organization and Contents of the Plan

Section II of this plan describes EEOC's technical assistance programs. Section III discusses DOJ's technical assistance program. Section IV describes the technical assistance to be provided by DOT. Section V focuses on FCC's technical assistance program. Section VI describes the technical assistance roles and activities of other Federal agencies in the planning and delivery of technical assistance under the ADA. Each section provides a brief summary of the agencies' responsibilities under the ADA and provides information on the entities and audiences for whom technical assistance projects and initiatives are to be developed.

Each agency's plan describes, on a broad program level, the technical assistance to be provided and the purposes the assistance is intended to achieve. Given that not all goals can be accomplished at once, each plan describes a framework of priorities for technical assistance delivery.

Neither the overall plan nor the individual component plans are intended to serve as detailed project-level operational documents, especially with respect to longer-range program activities. However, each plan does provide more detailed information with respect to short-term technical assistance activities (e.g., FY 1991 activities already underway).

II. Equal Employment Opportunity Commission Technical Assistance Program

Title I of the ADA prohibits employment discrimination on the basis of disability against qualified individuals with disabilities. Employers with 25 or more employees will be subject to the nondiscrimination requirements of the ADA on July 26, 1992; employers with 15 to 24 employees will be covered two years later, on July 26, 1994. The phase-in of coverage over four years was established to allow time for employers to become informed about their obligations under the statute and to provide additional time for smaller employers to comply with their obligations. This phase-in parallels the manner in which coverage of title VII of the Civil Rights Act of 1964 was applied to employers. All employers who are subject to title VII, with the exception of the Federal government, will be subject to the nondiscrimination requirements of the ADA. (The Federal government is covered by similar nondiscrimination requirements as well as affirmative action requirements under the Rehabilitation Act of 1973.)

The Equal Employment Opportunity Commission (EEOC or the Commission) is primarily responsible for the enforcement of the ADA's nondiscrimination provisions in employment. As is the case with title VII, which is also primarily enforced by the Commission, the Department of Justice has concurrent litigation authority under the ADA with respect to nondiscrimination in employment by State and local governmental entities. The Commission is responsible for issuing regulations to carry out the ADA's employment requirements by July 26, 1991.

As outlined in this proposed plan, the Commission, in cooperation with other governmental and private agencies and organizations, will conduct or expand

existing technical assistance activities designed to ensure that employers, individuals, and the public learn about the ADA's requirements with respect to employment and develop the ability to identify and solve employment compliance problems. The Commission expects these technical assistance efforts to result in greater compliance with the ADA's employment requirements, with a corresponding reduction in the need to resort to enforcement activity.

The Commission initially will seek to develop active liaison with a wide range of organizations and associations representing employers, other covered entities, and individuals with disabilities, at national and local levels, and to explore ways in which their established informational channels can be used to provide general and specific information on the employment requirements of the ADA. These organizations also will be asked to identify specific technical assistance needs of their constituencies, so that the Commission may better direct its efforts to meet these needs.

In addition, the Commission will solicit from these groups examples of ways to accommodate individuals with disabilities and other practical experiences that will be helpful in promoting voluntary compliance. The Commission also will utilize resources of other Federal agencies with responsibilities and specialized expertise on disability issues related to employment. To assure consistent guidance, materials developed by other agencies with respect to title I legal requirements will be reviewed by EEOC, pursuant to Executive Order 12067.

Employers and other covered entities will be actively encouraged to seek information and assistance to maximize voluntary compliance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Accordingly, employers and others who request information or assistance in regard to a particular aspect of compliance, or who participate in training conducted by the Commission, will not be subject to investigation or other enforcement action on the basis of such inquiries or participation.

The Commission's technical assistance program will include development of informational materials and training for employers, individuals with disabilities and the public, and assistance in response to individual requests. The program will be designed to provide information needed for compliance with the law to all those

covered by title I legal requirements. However, in allocating limited resources, priority may be given to providing technical assistance to targeted audiences. For example, small employers generally have not had previous experience in meeting nondiscrimination requirements of the Rehabilitation Act that have applied to larger employers who are Federal contractors or grantees. In addition, smaller employers have little access to information and assistance provided by commercial consultant services. The Commission also is aware of concerns expressed by small employers that indicate particular needs for guidance and assistance on the nature of their title I obligations.

The Commission's technical assistance program will be implemented in phases related to the effective dates of the statute and the issuance of regulations by the Commission. The Commission will focus its efforts on providing information and assistance on title I requirements prior to July 26, 1992, so that covered entities and individuals with disabilities are informed about their rights and obligations by the time the law comes into effect. It will provide general information on rights and responsibilities in employment under the ADA, specific information on the application of ADA nondiscrimination requirements to a range of employment practices, as well as guidance on how employers may comply with the law's reasonable accommodation requirements. In addition to technical assistance activities conducted by EEOC, many activities will be conducted by organizations representing employers and disabled individuals. The Commission also will utilize the resources of other Federal agencies to communicate legal requirements as widely as possible.

Prior to the issuance of regulations, EEOC will disseminate general information on the basic statutory requirements through a wide range of communications and information channels. It will publish a basic brochure on title I requirements, and separate, more detailed pamphlets providing information on legal requirements for employers as well as information on title I rights for disabled applicants and employees. Additional fact sheets and questions and answers will be developed in response to specific inquiries. The Commission's informational materials will be available in alternative formats to make them accessible to individuals with disabilities.

Information also will be provided to public media and to specialized communications media of employer and disability-oriented organizations. Commission staff will provide information on the law through active participation in conferences, workshops and meetings of these organizations throughout the country. An exhibit providing information on ADA requirements will be displayed at organizations' conferences and conventions.

EEOC will respond to individual inquiries through systems now used to respond to public inquiries on other laws it enforces, including a toll-free "800" number which will provide basic information on the ADA. Queries not answered by recorded information will be transferred to the nearest field office for a personal response. EEOC staff will be trained to assure that accurate helpful information is provided to the public. Staff also will be equipped to refer employers and others to appropriate specialized sources of assistance (such as national and local organizations representing persons with disabilities, the technical resources of regional disability research centers, and vocational rehabilitation agencies), that can provide assistance on making accommodations and other aspects of compliance.

Following issuance of the implementing regulations in July 1991, an expanded information and outreach program will be conducted to provide more detailed guidance to employers and individuals with disabilities on the application of the regulatory requirements. A comprehensive technical assistance manual will be produced and disseminated six months before the effective date of title I. The manual will be a major resource for employers and disabled persons. It will explain the legal requirements of the statute and regulations as they apply to specific employment practices, and will include guidance on reasonable accommodation, such as ways to accommodate individuals with specific types of impairments in specific work situations, as well as detailed guidance and examples of other important aspects of compliance.

The manual will include an extensive directory of technical assistance resources for reasonable accommodation, accessibility, and other aspects of compliance. EEOC intends to publish the manual in a format that can be updated with supplements as the Commission issues further guidance on specific issues, and as additional

technical assistance references and resources become available.

Further guidance on key title I policy issues will be developed prior to the effective date of the law for EEOC's internal compliance manual. This policy guidance, with the regulations, will be used to train Commission staff, nationwide, before the law goes into effect. The compliance manual guidance also will be available to the public at EEOC headquarters and its 50 field offices, in public libraries, and through commercial information services. Information on this guidance, in simplified and condensed formats, will be developed for broader public dissemination.

The Commission will conduct training seminars for employers and for individuals with disabilities on the regulatory requirements and their application to specific employment practices. It will expand the availability of training by producing videotapes of training sessions and explore use of mechanisms such as video-conferences to reach wider audiences. Organizations representing employers and disabled persons will be encouraged to conduct training for their members, with materials, speakers and other assistance from the Commission. If funding is available, training and technical assistance also may be developed and conducted by other organizations, under grants or contracts from the Commission.

The Commission will expand public information and technical assistance activities near the effective date of title I. Public service announcements will be aired on radio and television, additional information will be provided to a broad range of general and specialized media, and Commission speakers will participate in radio, television, organizational and other forums throughout the country, to emphasize and clarify legal requirements.

EEOC will continue to provide technical assistance after the law becomes effective, through additional information materials, training activities and response to requests for information and assistance. As the Commission develops additional policy guidance, and as particular aspects of compliance are identified by employers and disabled individuals to require further explanation, informational materials and training will address these specific compliance issues. Expanded technical assistance will be provided by Commission field staff. A central information library of technical assistance resources will be developed and updated to facilitate response to

individual requests. The Commission will continue to work closely with disability groups, employer organizations, and other Federal agencies, utilizing their resources and information networks to supplement its own technical assistance activities, and to provide specialized assistance that will aid compliance with the employment requirements of the ADA.

III. Department of Justice Technical Assistance Program

The Department of Justice is responsible for enforcing titles II and III of the ADA, and is responsible for providing technical assistance related to compliance with those titles, except as described below. Title II prohibits discrimination on the basis of disability by non-Federal public entities, and title III prohibits such discrimination in public accommodations. Although, as discussed below, each of these titles covers different types of entities and establishes separate substantive requirements, technical assistance in both areas will be discussed in this portion of the plan because DOJ has responsibilities in both areas and will pursue similar strategies in each area.

Title II of the ADA prohibits discrimination on the basis of disability by public entities, including State and local governments. Although the coverage provided by title II extends to public transportation services provided by such public entities, technical assistance related to transportation is covered in section IV of this plan. The ADA requires that State and local government operations be in compliance with those requirements of title II that are covered in this section of the plan effective January 26, 1992. The ADA further requires DOJ to issue regulations implementing the nontransportation requirements of title II by July 26, 1991. Compliance with title II shall be in accordance with the requirements of section 504 of the Rehabilitation Act of 1973, as amended. Accordingly, State and local governments will be required to ensure that government facilities, services, and communications are accessible to individuals with disabilities except where a fundamental alteration in the program or an undue burden would result. Enforcement of title II will be effected by Federal agencies to be designated by DOJ or by lawsuits brought by private parties.

Title III of the ADA prohibits discrimination on the basis of disability by public accommodations so that individuals with disabilities will have the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations in

places of public accommodation. Although the coverage provided by title III extends to certain public transportation services provided by certain private entities, technical assistance related to transportation will be covered in section IV of this plan. The ADA requires that public accommodations be in compliance with those requirements of title III that are covered in this section of the plan effective January 26, 1992. The ADA further requires DOJ to issue regulations implementing the nontransportation requirements of title III by July 26, 1991.

Compliance with title III means that public accommodations will be readily accessible to individuals with disabilities. In order to accomplish this, the ADA establishes physical accessibility standards to make new construction and alterations accessible. The ADA also requires public accommodations to remove physical barriers to accessibility in existing facilities, if readily achievable, or, if such removal is not readily achievable, alternative methods of providing the services must be offered if those methods are readily achievable. In addition, entities covered by title III will be required to provide auxiliary aids and services to individuals with disabilities, such as hearing or vision impairments, in order to ensure that such individuals have access to the goods and services offered by a public accommodation, unless an undue burden would result. Enforcement of title III will be by DOJ or by lawsuits brought by private parties.

Examples of public accommodations addressed in this portion of the plan are private entities, other than those providing public transportation services, with operations that affect commerce, such as: places of public lodging, including inns, hotels, and motels; establishments that serve food or beverages, including restaurants and bars; places of entertainment or exhibition, including theaters, concert halls, and stadiums; places of public gathering, including auditoriums, convention centers, and lecture halls; sales or retail establishments, including bakeries, grocery stores, clothing stores, hardware stores, and shopping centers; service establishments, including laundromats, dry cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, accountants' offices, attorneys' offices, pharmacies, insurance offices, health care providers' offices, and hospitals; places of public display or collection, including museums, libraries, and galleries; places

of recreation, including parks, zoos, and amusement parks; places of education, including nursery, elementary, secondary, undergraduate, and postgraduate private schools; social service establishments, including day care centers, senior citizen centers, homeless shelters, food banks, and adoption agencies; and places of exercise or recreation, including gymnasiums, health spas, bowling alleys, and golf courses.

DOJ will expand existing technical assistance activities designed to ensure that entities and individuals affected by titles II and III learn about the ADA's requirements and develop the ability to identify and solve compliance problems. The goal of this aspect of the plan is to provide technical assistance to as many entities and individuals as possible over the term of the plan. DOJ recognizes that it will be necessary to set priorities that take into consideration the relative need for such assistance and strategies for maximum effectiveness of such assistance.

Since July, 1990, DOJ has staffed an ADA information line to take requests for materials and answer questions about the ADA. Concomitantly, DOJ has developed and distributed general information, such as fact sheets, pamphlets, and copies of the ADA, in printed and accessible formats. DOJ has established a speakers' bureau to make DOJ personnel available to make speeches and participate in workshops, seminars, classes, conferences, conventions, and other similar meetings. A display also has been developed for use at such gatherings to focus attendees' attention on the ADA and facilitate the distribution of materials.

DOJ plans to base its future technical assistance activities on research, requests from contacts, and information received during the process of issuing regulations. DOJ will survey the universe of entities covered by titles II and III as well as existing networks of agencies, organizations, and associations that represent the covered entities. DOJ then will determine which of these organizations could most effectively provide technical assistance, and how to structure such technical assistance efforts.

Projects undertaken in conjunction with organizations of covered entities will inform and train covered entities about ADA requirements and how to solve compliance problems. Those projects will also provide information about model compliance strategies and will assist individual entities in achieving compliance. DOJ planning efforts will also determine the most

effective types of informational and training materials and mechanisms for delivery of training for the different types of audiences that must be reached. For example, the informational needs and training delivery mechanisms for places of recreation, such as amusement parks, would differ greatly from those required by sales or retail establishments, such as grocery stores. In addition, DOJ will do research to determine issues on which further information is needed and prepare materials and training accordingly.

Similar types of determinations with respect to most effective technical assistance and the structuring of such assistance efforts will be made with respect to organizations and associations of, or representing, individuals with disabilities. Projects undertaken with such organizations will provide information and training to persons with disabilities to enable them to assist covered entities to resolve compliance questions.

In addition, DOJ will use teleconferences and videotapes to reach widely dispersed audiences. Depending on the needs of the particular groups participating in a given teleconference, a varying mix of presentations and questions and answers will be provided. Teleconferences will be videotaped and copies of the tapes distributed and made available for rebroadcast by media such as cable television stations. Wherever possible, other Federal agencies involved in enforcing the ADA or providing technical assistance about the ADA will participate in these teleconferences.

In addition to other types of training materials, DOJ will also prepare video training tapes that will be tailored to assist major groups of entities in complying with the ADA. For example, there could be one training tape designed to answer questions related to compliance by entities in the food service industry, and there could be another tape oriented toward answering compliance questions raised by sales and retail establishments.

In accordance with a requirement of the ADA, DOJ will also develop a technical assistance manual. DOJ will use both research and contacts to determine the contents of the manual and the most effective format for wide distribution. It is anticipated that it will be made available in electronic format (CD-ROM and computer disk), which will both enhance DOJ's ability to distribute the manual in an efficient manner and make the manual readily available to persons with sensory impairments. Moreover, as policy develops and as information is received

regarding technical assistance needs, in succeeding years this manual will be updated and revised.

Other technical assistance materials will be developed to meet varying degrees of technical need by entities and individuals affected. For example, a narrative description of the requirements of the regulations implementing title III will be developed for general use. Question-and-answer booklets will be prepared, some for general use, others for use by specific types of entities that are encountering specific types of compliance issues. In addition, technical assistance guides (TAG's) each of which address a specific compliance issue or resource, will continue to be prepared. (DOJ has issued 43 such guides to assist entities in complying with section 504 of the Rehabilitation Act of 1973, as amended, and this ongoing program is now expanded to cover the ADA.)

Additional special technical assistance and training projects will be undertaken by DOJ, either directly or through grants or contracts. Personnel from other Federal agencies, who are either involved in ADA enforcement or other activities of have significant contact with individuals with disabilities, will be trained on the requirements of titles II and III. Examples might include personnel from United States Attorney's offices, the Rehabilitation Services Administration, and the civil rights offices of other Federal Executive agencies.

In addition, special training or outreach projects will be planned to meet needs as they are identified. Where problems are significant in terms of number or degree, checklists for compliance or models of compliance for certain types of entities and certain types of compliance issues will be developed for duplication elsewhere. (For example, checklists for the food service industry could be prepared, or compliance models for health providers' offices could be developed.) Or, where problems are found in terms of providing information to individuals with disabilities who are members of minority groups, including racial, language, or cultural minorities, special outreach and training projects will be developed. Special projects will be conducted to reach specific audiences, in some instances at a national level and in other instances at the local level, whichever will be more effective.

IV. Department of Transportation Technical Assistance Program

The Department of Transportation (DOT) has lead responsibility for issuing a regulation to implement title II of the

ADA with respect to nondiscrimination in public mass transportation systems. (DOT has already issued a portion of the rules needed to implement the ADA, concerning the acquisition of accessible vehicles.) DOT has significant enforcement responsibilities for processing complaints alleging violations of the ADA in the public and private transportation sectors. The Secretary of Transportation reviews paratransit plans developed by local public transportation service providers. The Secretary also may grant relief from requirements addressing issues such as the purchase of new accessible vehicles or alteration of existing facilities. DOT has substantial interagency consultation responsibilities, primarily with the Architectural and Transportation Barriers Compliance Board (ATBCB) for the development of accessibility standards for public transit vehicles and facilities.

An entirely new sector of transportation service providers is effected by title III of the ADA. For the first time, many private entities engaged in transportation services are prohibited by Federal law from discriminating on the basis of disability. The ADA requires new over-the-road buses to be accessible within six years (seven years for small companies). This deadline may be extended by the President after completion of a study of Congress's Office of Technology Assessment. Other new vehicles, such as vans, must be accessible, unless the transportation company provides service to individuals with disabilities that is equivalent to that operated for the general public. If a private charter company can accommodate its disabled consumers by using accessible vehicles in its existing fleet (or by using leased vehicles), newly purchased vehicles do not have to be accessible. With regard to private sector transportation, the ADA also requires that related transportation operations, including station facilities, must meet the requirements for public accommodations under title III.

Under title III, DOT must issue a regulation for such private sector transportation services, including an interim regulation for over-the-road buses until the technology study is completed. DOT will coordinate its activities and consult extensively with the ATBCB and DOJ in the development of private sector transportation service accessibility standards.

Under its general mandate to establish and administer national transportation policy, DOT has been involved over the years in an array of technical assistance efforts to make

transportation services accessible, safe, convenient, and affordable for persons with disabilities. As a result, DOT has developed considerable institutional expertise in accessibility issues as they relate to transportation services. Many ongoing technical assistance projects and projected FY 1991 activities also are applicable to the ADA. Thus, DOT's technical assistance program under ADA would be dovetailed into the agency's ongoing efforts to enforce accessibility requirements, and to otherwise assist transportation providers and representatives of disabled individuals.

One of DOT's major technical assistance initiatives in the area of accessibility is Project Action, a program mandated by Congress in 1988, that calls for the creation and demonstration of cooperative methods for improving accessible transportation.

It is managed by the Easter Seal Society in conjunction with DOT's Urban Mass Transportation Administration. Congress, after consulting with transportation industry and disability rights leaders, identified Project Action's technical assistance priorities. These areas include: identifying people with disabilities in the community and their transportation needs; developing outreach and marketing strategies; developing training programs for transit providers and for transit users with disabilities; and, applying technology to eliminate barriers to transportation accessibility.

DOT would use these identified transportation access critical areas as the strategy springboard for its technical assistance activities under the ADA. DOT also would seek to expand upon these priority areas. Particular attention would be paid to identifying the range of disabilities that require innovation to make transportation accessible, and to providing technical assistance materials in alternate formats. The objects is to provide adequate notice so that the public and especially individuals with disabilities can participate effectively in the development of standards and regulations under the ADA. DOT also would focus on programs designed to train transit operators and educate consumers. DOT would give priority to expanding these activities beyond single-event orientation training.

Currently, DOT provides technical assistance to selected Federal agency staff and to a wide variety of public and private transportation entities, including many mass transit professionals. Individual consumers are also targeted. Many of these activities have been responsive to specific requests. DOT, as part of its ADA technical assistance

initiatives, would actively encourage staff to develop technical assistance outreach efforts and to establish and maintain ongoing assessments (including compliance reviews and audits) of covered entity and consumer needs.

The goal of DOT's initial technical assistance activities would be to reach the public at large, the staff of State and local transit authorities, contract providers in the transit industry, equipment vendors, trade and professional organizations, disability advocacy groups, and individual consumers. DOT would provide technical assistance principally by using existing staff. However, to implement the ADA, and as budgeted resources permit, DOT could supplement its technical assistance effort with grants, cooperative agreements, and contracts.

DOT could encourage projects that are expected to continue to provide assistance beyond the duration of Federal funding, particularly when they foster cooperation between the transit industry and the disability community or promote interagency coordination. In selecting technical assistance grantees or contractors, DOT will consider giving priority to the grantees and contractors with the capacity to continue technical assistance activities, to produce deliverables that can be readily replicated, and to address innovative subject areas or solutions to problems.

DOT is considering a number of technical assistance activities, including the following:

- DOT could prepare materials for dissemination to covered entities and consumers that summarize and explain ADA requirements and DOT's policies and regulations. Preparation of such materials includes updating UMTA's 1986 bus lift and securement device guidelines.

- DOT could promote the training of transit industry officials, disability advocates, and individual consumers to encourage voluntary compliance with the ADA. Training transportation design and construction professionals, engineers and architects, and State and local code enforcement agencies also will be encouraged. Areas of emphasis would include innovative technology (such as wheelchair lift and securement devices), transit operator training, consumer use outreach, marketing, and training, and the identification of the variety of disabilities that must be accommodated to achieve access to transportation.

- DOT could develop guidance materials for DOT's program and legal staff to facilitate ADA enforcement techniques and strategies. Training in

the newly covered areas of private sector transportation compliance would be provided as appropriate.

- DOT could continue with efforts underway to foster the exchange of information, materials, technical assistance strategies, techniques, and successful compliance practices and procedures among DOT staff providing technical assistance. Where current procedures are inadequate, DOT would intra-agency memoranda of understanding or other types of formal agreements to enhance such activities.
- DOT could improve its coordination with outside staff, including those of State and local transportation and civil rights agencies, to facilitate meeting mutual civil rights and ADA compliance objectives and to promote the sharing of information. Again, formal memoranda of understanding or delegation agreements to improve current efforts would be developed in warranted.

To summarize, DOT efforts would be intended to promote an extensive exchange of information, materials, techniques, and strategies to achieve compliance with the ADA. DOT would spread its technical assistance efforts equitably among its own staff, the transportation industry, and disability advocacy and individual consumers. Comment is sought on whether these activities are beneficial or sufficient, or whether there are more or different activities that DOT should consider. Given that DOT's resources for providing technical assistance may be limited, comment is also sought on how these activities should be prioritized.

V. Federal Communications Commission Technical Assistance Program

Title IV of the Americans With Disabilities Act (ADA) amends title II of the Communications Act of 1934 and codifies the requirement that common carriers provide intrastate and interstate telecommunication relay services for telephone calls made between users of telecommunication devices for the deaf (TDD's) and users of voice telephones. Title IV also requires closed-captioning of federally produced or funded television public service announcements.

The Federal Communications Commission (FCC) has responsibility for issuing regulations to carry out the ADA's provisions for common carriers to establish relay services within three years either individually, through designees, or through selected vendors. The FCC also has significant enforcement responsibilities with regard to the establishment and operation of the intrastate and interstate relay

systems. Within 180 days, the FCC shall resolve complaints alleging violations of the relay service regulations. In instances where the FCC has certified a State relay service program, primary enforcement authority is placed with the States. However, the FCC exercises jurisdiction over complaints when States do not process complaints in timely fashion (180 days or sooner if State programs require) or when the State program is decertified by the FCC.

The FCC has been involved historically with issues concerning the telecommunications needs of hearing impaired and other disabled persons. For example, for purposes of section 504 of the Rehabilitation Act of 1973, as amended, the FCC is an "executive agency" and has issued its handicapped nondiscrimination regulations. Section 710 of the Communications Act, Telephone Service for the Disabled, 47 U.S.C. 610, required the Commission to establish regulations "as are necessary to ensure reasonable access to telephone service by persons with impaired hearing." Thus, prior to the ADA, the FCC gained considerable expertise on the broad subject of accessibility to telecommunications by disabled persons. As a result of these activities and its traditional role in regulating the telecommunications industry, the FCC has concluded that the principal method for providing the ADA's required technical assistance is through its rulemaking activity.

With its attendant private and public press coverage, the FCC's rulemaking process can be expected to go far in developing effective and efficient relay services as well as performing necessary education functions. The overarching principle the FCC will follow in telephone relay service rulemaking and other technical assistance efforts under the ADA will be to continue to provide the broadest and fairest opportunity for public participation to the telecommunications industry, disability rights advocacy groups, and to consumers.

In addition, the FCC will actively pursue other technical assistance actions to complement its regulation. For example, as resources permit, outside contractors and grantees may be used to develop technical assistance projects, especially in issue areas that require study or creative solutions to complex problems. The use of innovative technological products will be another focus area of technical assistance efforts. These efforts will be implemented by FCC staff, the regulated entities, and disability rights advocacy groups. In addition to responding to

requests for technical assistance, the FCC headquarters and field staff will encourage affirmative outreach efforts based on existing staff resources and on the continuing assessment of needs among the common carriers, consumers, and their respective representative organizations.

Some specific ADA technical assistance activities and focus areas that will receive particular attention during FY 1991 are as follows:

- The FCC will encourage its staff to coordinate with and pursue advice and comments from all interested parties affected by telecommunications relay systems, *i.e.*, beyond the public forums. This action will include participation by FCC staff in the Technical Assistance Working Group. Ideally, meetings of industry or consumer coalitions will result in consensus recommendations about how to implement functional and reliable relay service systems that can be shared among covered entities and brought to the Commission for consideration and action.

- The FCC's headquarters Office of Public Affairs and the Field Operations Bureau through its Public Service Division will develop and disseminate ADA materials such as news releases, public notices, internal information documents, forms, bulletins, fact sheets, and other information material that summarize the ADA and the FCC's telephone relay regulations and enforcement procedures thereunder.

- The FCC will train appropriate staff about the ADA's requirements, particularly staff within the Common Carrier Bureau who work directly with the telecommunications industry, Public Utility Commissions, and State and local officials with telecommunications responsibilities.

- Material and training courses will be provided to the FCC's investigative personnel and legal staff charged with responding to complaints. Because primary enforcement responsibility for State certified relay programs resides with State officials, the FCC will promote the sharing of information about successful telephone relay operations and techniques.

- By virtue of the fact that there are approximately 17 States with operational formal relay programs and approximately 10 more are in planning stages, the FCC's technical assistance effort will seek to encourage the exchange of research, technical, and program information among these entities and carriers or States with less experience in relay systems. The FCC's staff will provide scientific and technical support, monitor scientific and

technological developments, and analyze information in this regard.

- The FCC will seek to resolve in its rulemaking and technical assistance efforts issues that hinder effective and reliable relay services. They include such matters as operator confidentiality, ability of relay systems and operators to handle all classes of calls (credit card calls, TDD/voice mixed calls, calls to recorded messages, 911 emergency), skills of operators to interpret typewritten American sign language, general skills of operators as regards typing, spelling, and vocabulary, and transmission by both ASCII Baudot formats.

- The FCC will coordinate with other Federal agencies and disseminate information about the requirement that federally funded or produced public service announcements require closed captioning of verbal content. The FCC will monitor implementation of this provision and, if noncompliance dictates, the FCC will pursue remedial action.

VI. Technical Assistance Provided by Other Federal Agencies

A. Architectural and Transportation Barriers Compliance Board

The Architectural and Transportation Barriers Compliance Board (ATBCB or the Board) is an independent Federal agency established by section 502 of the Rehabilitation Act principally to enforce the Architectural Barriers Act. The Board's other major functions include establishing minimum guidelines for accessibility standards and providing technical assistance to entities affected by the Rehabilitation Act of 1973.

Pursuant to its technical assistance authority, the Board has been and is currently involved in various projects related to accessibility under the Uniform Federal Accessibility Standards (UFAS), the current Federal standard implementing the Architectural Barriers Act. The Board is also engaged in various other projects that are not specifically connected with UFAS but which were or will be undertaken pursuant to the Board's broad technical assistance authority under section 502 of the Rehabilitation Act. With the passage of the ADA, each of these projects will be amended to include specific ADA components, and other future projects will be specifically aimed at providing technical assistance under the ADA.

The ADA identifies UFAS as the interim accessibility standard for new construction and alterations if the Department of Justice (DOJ) or Department of Transportation (DOT)

regulations are delayed or until the new ATBCB supplemental minimum guidelines are issued. Provision of technical assistance concerning UFAS is, accordingly, particularly important to ensure adequate understanding of ADA requirements. The Board has begun several major technical assistance projects concerning UFAS, including a retrofit manual, a UFAS checklist (which is now in printing), a training program, and a videotape.

In addition to these projects aimed at providing assistance in understanding UFAS, the Board plans to offer training specifically on the ADA at 30 locations throughout the country, assuming adequate resources. The Board will also provide technical assistance about the ADA through brochures, pamphlets, and other materials related to the development of the supplemental minimum guidelines, which it is required to issue within nine months of enactment of the ADA.

The Board has undertaken or will undertake a series of projects specifically related to transportation. The Board has designated 1991 and 1992 as transportation focus years, and all future transportation projects will have statements of work that have ADA components in them. During 1991 the Board will be developing training materials for the Urban Mass Transportation Administration (UMTA) and, during 1992, the Board will conduct training sessions for UMTA staff using those materials.

The Board will continue to fund and manage research projects to ensure that accessibility standards are consistent with emerging technologies and needs. The Board intends to conduct research on mobility aids and maneuvering space in vehicles as well as on transit facility design for persons with hearing and visual impairments. Upon completion of these research projects, the Board will provide technical assistance in the form of brochures, pamphlets, etc., to disseminate the research results. Each of these projects, although originally developed under the Board's section 502 or Architectural Barriers Act authority, is directly related to the ADA and will serve to provide technical assistance on implementation of the ADA.

In addition to modifications to projects already contemplated and authorized under other authorities, the Board will provide technical assistance to transportation officials specifically regarding implementation of the ADA. Given sufficient resources, it will develop a manual on transit vehicles and will subsequently give training around the country in connection with its facility accessibility training.

The Board currently provides technical assistance to Federal agencies as well as to a wide variety of private entities, including architects, designers, and private individuals. This effort will be greatly expanded under the ADA and will include technical assistance concentrated primarily on the building profession. The focus will be on architects, designers, architecture and design schools, engineering schools, organizations of construction companies and construction-related manufacturers. State and local code enforcement officials and organizations representing such officials, and State and local officials who are particularly responsible for access. Work with State code enforcement agencies will include technical assistance efforts for those agencies interested in improving their accessibility codes and obtaining certification. The Board's transportation efforts will be directed toward transportation planners and engineers (those who prepare bid specifications or similar documents), and equipment designers and manufacturers. Since July 1990, the Board has operated a toll-free information line to provide information to consumers and professionals about accessibility requirements under titles II and III of the ADA. In addition, the Board has an extensive technical library that is open to the public. The library has more than 3,500 titles, which provide technical information on products, services, and methods related to accessible design in new construction and alterations. The Board also has a computerized data base catalog of this collection with abstracts and is currently exploring options for making this resource available to the public through a computer bulletin board or other on-line service.

The ATBCB and DOJ will work closely together in connection with the development of accessibility standards for the regulations implementing title III and, when ADA enforcement begins, the ATBCB will provide technical assistance to DOJ in connection with complaints filed with DOJ alleging violations of the new construction and alterations standards of the ADA. Likewise, in the area of transportation, the ATBCB will work closely with DOT in developing standards for vehicles and public transit facilities under title II. As part of its technical assistance effort, the Board will subsequently be available to DOT to provide technical assistance on complaints filed alleging violations of those standards.

B. Department of Commerce

The Department of Commerce (DOC) is responsible for fostering, promoting

and developing commerce in both domestic and foreign markets. In order to accomplish these objectives, DOC is involved in an extensive array of activities in which a variety of offices within DOC interact with, and provide services to, the business community nationwide and State and local governments. These existing programs and services will be used by DOC to provide technical assistance to entities covered by the ADA, particularly in the areas of employment, public accommodations, and State and local government operations. Among the offices of DOC that will be participating in technical assistance efforts will be the National Technical Information Service, the International Trade Administration, the Office of Business Liaison, the National Institute of Science and Technology, the Office of Information Resources Management, the Minority Business Development Agency, and the Census Bureau.

Depending on the particular mission and expertise of each of these offices within DOC, some of these offices will focus more on providing information about the rights and responsibilities established by the ADA, and other DOC offices will focus more on the complementary function of providing information that will assist covered entities in complying with the ADA. For example, the International Trade Administration, the Office of Business Liaison, and the Minority Business Development Agency will all use their respective publications to disseminate information about the requirements of the ADA, about sources of additional information related to specific issues, and about resources available to assist their clientele to comply with the ADA. As appropriate, these offices will also utilize their mailing lists of clients to disseminate materials related to ADA issues of special interest to their client communities. As a general principle, these activities will be directed toward the dissemination of materials that have been prepared by other Federal agencies, particularly EEOC, DOJ, or ATBCB, or the incorporation of materials that have been prepared by EEOC, DOJ, or ATBCB into DOC publications. In addition, field staff in these offices will be prepared to serve as information coordinators so that when clients in the business community served by the DOC office call with specific questions about compliance with the ADA or sources available to assist them in complying with the ADA, DOC field staff will be able to make appropriate referrals.

For other offices within DOC, the technical assistance provided will focus on the dissemination of information that will assist entities covered by the ADA to comply with its requirements. For example, the Office of Information Resources will continue to provide workshops and exhibits for participants from the business community and from the public sector that provide information on computer technology available to assist in making reasonable accommodations for individuals with disabilities in employment and to assist in enabling individuals with disabilities to participate in other types of programs or activities. Similarly, the National Institute of Science and Technology will acquire a collection of scientific and technical publications on disability issues, particularly publications that will be useful to the resolution of compliance questions. The availability of these publications, in a variety of accessible formats, will be extensively publicized by the Service. In addition, the National Institute of Science and Technology will continue to conduct research on disability-related issues and will disseminate its findings relevant to the solution of compliance issues arising under the ADA in the most effective manner available. The Census Bureau will make statistical information on individuals with disabilities available to business, government, and community representatives seeking to identify and resolve compliance issues.

C. National Council on Disability

The National Council on Disability (NCD) is an independent Federal agency responsible for reviewing all Federal laws, programs, and policies affecting individuals with disabilities and for making recommendations in these areas, as it deems necessary, to the President, the Congress, and a variety of Federal Executive departments and agencies, including the Department of Education, the Rehabilitation Services Administration, and the National Institute on Disability and Rehabilitation Research (NIDRR). In addition, NCD establishes policies for and monitors the performance of NIDRR, and it reviews and approves standards concerning "Independent Living" and "Projects With Industry" programs.

Although many Federal agencies deal with issues and programs affecting people with disabilities, NCD is the only agency with a comprehensive mandate to address, analyze, and make recommendations on issues of public policy that affect people with disabilities regardless of age, disability type, perceived employment potential,

perceived economic need, specific functional ability, status as a veteran, or other individual circumstance(s). In carrying out these responsibilities, NCD performs a unique function by assuring a coordinated approach to addressing the concerns of persons with disabilities and eliminating barriers to their active participation in all aspects of life. In the performance of these responsibilities, NCD prepared a report to the President and the Congress, *Towards Independence*, which has been recognized as the seminal document leading to the enactment of the ADA. As stated by the Conference Committee on the ADA:

The conferees intend to recognize the National Council on Disability as the impetus, force, and originator of the initial legislation for the Americans with Disabilities Act, reflected in the Council's report, *Toward Independence*, published in February, 1986. Therefore, the conferees agree that the National Council on Disability should be one of the (F)ederal agencies with which the Attorney General consults in developing a plan to assist entities covered under this Act. The experience, expertise, and commitment of the Council will ensure that the technical assistance activities mandated under section 506 will be comprehensive, focused, and timely.

In order to carry out these responsibilities, NCD will be involved in the development of overall strategies for implementation of the ADA. As intended by Congress, an important focus of NCD's work with these other Federal agencies will be the development of strategies to ensure the performance of technical assistance activities that are coordinated, comprehensive, and effective.

D. National Institute on Disability and Rehabilitation Research

The National Institute on Disability and Rehabilitation Research (NIDRR) is a Federal institute responsible for the promotion and coordination of research and related activities regarding the provision of vocational and other rehabilitative services to individuals with disabilities. Among NIDRR's responsibilities is the award of contracts and grants for the purpose of planning and conducting research, demonstrations, and related activities pertaining to the development of methods, procedures, and devices to assist in the provision of vocational and other rehabilitation services to individuals with disabilities. One of NIDRR's specialized research tasks is the establishment and support of rehabilitation research centers, which are operated in collaboration with institutions of higher education. Among

the research responsibilities of these centers is the development and dissemination of innovative methods of applying advanced medical technology, engineering technology, and other scientific knowledge to solve rehabilitation problems. The research activities at other research centers established and supported by NIDRR are focused on training related to the more effective provision of rehabilitative services.

In order to assist entities covered by the ADA to benefit from the advanced engineering, medical, psychological, vocational, and other scientific information available through NIDRR and organizations assisted by NIDRR, NIDRR will establish technical assistance centers in 8 to 12 communities throughout the country. The centers will offer such services as toll-free information lines, publications and other materials, training, on-line data bases, referrals, and direct consultations with technical assistance providers. The emphasis of these technical assistance centers will be on assisting employers to comply with the ADA, for example, by providing engineering information relevant to making reasonable accommodations. However, the centers will also be available to provide this type of information to entities covered by other provisions of the ADA, such as public accommodations.

E. President's Committee on Employment of People With Disabilities

The President's Committee on Employment of People with Disabilities (PCEPD) is one of the oldest Presidential committees, established in 1947 as the President's Committee on Employment of the Handicapped. Since that time PCEPD has worked to eliminate structural and attitudinal barriers that have impeded opportunities and progress for individuals with disabilities, particularly in the work place, and to mobilize public and private resources to achieve these objectives. Members of PCEPD are selected from the public and private sectors, including government, business, industry, labor, education, the media, and the professions. As discussed below, PCEPD provides valuable services and works closely with existing networks that can be important in assisting and supplementing the technical assistance program of the Equal Employment Opportunity Commission on the employment requirements of the ADA.

Every State has a Governor's Committee on the Employment of the Handicapped or a similar organization

with comparable goals that works closely with PCEPD. The State organizations enable PCEPD to reach the "grass roots" level, and the membership of the State committees reflects both the public and private sectors in a manner similar to PCEPD's membership. In many cases there are also committees with the same goals at the city, county, or town level, which work cooperatively with the State committees, enhancing further the ability of PCEPD to reach the "grass roots" level. Using these networks that have been developed over the years, PCEPD has engaged in a variety of activities that shall be expanded in order to provide technical assistance about the employment provisions of the ADA.

One of the most important of PCEPD's traditional activities has been its Job Accommodation Network (JAN), which is a service that provides specific information, free of charge, about how to make reasonable accommodations, about the most up-to-date technological devices that are available to assist employers in making reasonable accommodations, and about strategies that have been used successfully in specific employment contexts. This service is primarily used by employers, and has proved to be invaluable to employers who were subject to Federal laws requiring nondiscrimination on the basis of disability that predate the ADA, such as sections 503 and 504 of the Rehabilitation Act of 1973, as amended, which prohibit discrimination on the basis of disability by Federal contractors and by federally assisted programs, respectively. In order to provide even more technical assistance in this area so that new needs for information resulting from the ADA are met, PCEPD will expand this service by adding more incoming lines on its toll-free JAN telephone number and by adding staff to receive these calls and provide the requested information.

Another longstanding activity engaged in by PCEPD is the distribution of technical assistance materials, such as publications and posters, free of charge, to the Governor's Committees and other interested organizations. The State committees disseminate these materials to local committees and other local organizations. In addition, PCEPD maintains a library of technical assistance films and videotapes, which are loaned to interested organizations. Representatives of PCEPD provide direct technical assistance advice to these State and local organizations on a regular basis. All of these activities, distribution and loan of materials and

provision of information directly to State and local committees, will be expanded to address the requirements of the ADA.

Another technical assistance network that has been developed over the years by PCEPD consists of labor and management organizations. Technical assistance materials are also disseminated through these channels and representatives of PCEPD provide direct technical assistance to these organizations. The technical assistance provided by PCEPD to labor and management organizations will be augmented to provide practical information about the employment requirements of the ADA.

Also, PCEPD has developed technical assistance networks with interested trade associations, providing materials and advice to these organizations. These activities will also be expanded to provide information about rights and responsibilities in employment under the ADA.

The primary mission of PCEPD is the provision of technical assistance related to employment and, for this reason, PCEPD will concentrate on providing information related to the employment provisions of the ADA. However, because many of the employers and other organizations with which PCEPD will be in contact will be affected by provisions of the ADA in addition to those pertaining to employment, for example, the provisions regarding nondiscrimination in public accommodations, PCEPD will also provide a certain amount of general technical assistance about the ADA through its existing networks.

F. Small Business Administration

The Small Business Administration (SBA) is responsible for assisting small businesses in their efforts to compete effectively in the national and international economies. Among the many activities carried out by SBA in order to accomplish these objectives are the dissemination of information needed by small businesses, and the training and counseling of individuals involved in the management of small business and individuals who are interested in owning and operating a small business. As explained below, in connection with carrying out its many activities, SBA has developed a number of networks for the communication of information and these networks will be used to provide technical assistance about the ADA, in the areas of employment and public accommodations, to small businesses covered by those provisions of the ADA. Several offices within SBA are particularly well suited to provide assistance, including the Office of Civil

Rights Compliance, the Office of Advocacy, and the Office of Business Development. For the most part, SBA's technical assistance efforts will be directed toward (1) The dissemination of materials that have been prepared by other Federal agencies, particularly the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), or the Architectural and Transportation Barriers Compliance Board (ATBCB); and (2) the incorporation of materials that have been prepared by EEOC, DOJ, or ATBCB into SBA publications.

The SBA Office of Civil Rights Compliance has years of experience in assisting small businesses covered by section 504 of the Rehabilitation Act and similar laws that require equal opportunity regardless of disability to comply with these laws. This office will use these same channels of communication with organizations representing small businesses and directly with small businesses to disseminate information about the ADA and to provide information about resources available to small businesses to assist in compliance efforts.

The SBA Office of Business Development works with small businesses to assist them in starting up and operating effectively and successfully. This office will use its networks and resources to disseminate information about the requirements of the ADA and about how to comply with the ADA. Included among the channels of communication are training courses throughout the nation and publications and other materials that are made available to small businesses. This office also is able to access a variety of mailing lists that could be used for technical assistance purposes. The technical assistance efforts of this office will be further enhanced through its ongoing work in cooperation with the small business development centers and university programs, and through its coordination with the Service Corps of Retired Executives.

The SBA Office of Advocacy works with small businesses with an orientation toward determining what is helpful or what is detrimental to the operation of small businesses and then taking steps in a variety of forums to assist small businesses in the development of positive factors and the removal of harmful factors. This office also has resources and networks, including a newsletter and an "answer desk" with a toll-free number, that will be employed to disseminate information about the requirements of the ADA and how to comply with the ADA. It is also

anticipated that this office, in its role of advocate for small businesses, will serve an important coordination role so that small businesses that have specific questions about the nature of their obligations with respect to employment or public accommodations under the ADA or technical questions about how to comply with those provisions will be put in touch with the appropriate sources of information and assistance.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1630

Equal Employment Opportunity for Individuals With Disabilities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate the Commission is publishing a proposed new part 1630 to its regulations to implement title I and sections 3(2), 3(3), 501, 503, 508, 510 and 511 of the ADA as those sections pertain to employment. These regulations prohibit discrimination against qualified individuals with disabilities in all aspects of employment.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 29, 1991. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street NW., Washington, DC 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663-4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, room 6502, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays, from March 14, 1991, until the

Commission publishes the rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment call (202) 663-4630 (voice), (202) 663-4630 (TDD).

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4395 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, (202) 663-4638 (voice), (202) 663-7026 (TDD).

SUPPLEMENTARY INFORMATION: The Commission actively solicited and considered public comment in the development of proposed part 1630. On August 1, 1990, the Commission published an advance notice of proposed rulemaking (ANPRM), 55 FR 31192, informing the public that the Commission had begun the process of developing substantive regulations pursuant to title I of the ADA and inviting comment from interested groups and individuals. The comment period ended on August 31, 1990. In response to the ANPRM, the Commission received 138 comments from various disability rights organizations, employer groups, and individuals. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2400 representatives from disability rights organizations and employer groups participated in these meetings.

The format of the regulations reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104. Accordingly, in developing these regulations, the Commission has been guided by the section 504 regulations and the case law interpreting those regulations.

It is the intent of Congress that these regulations be comprehensive and easily understood. Proposed part 1630, therefore, defines terms not previously defined in the regulations implementing section 504 of the Rehabilitation Act, such as "substantially limits," "essential functions," and "reasonable accommodation." Of necessity, many of the determinations that may be required by this proposed part must be made on a case by case basis. Where possible the

regulations establish parameters to serve as guidelines in such inquiries.

The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights under these regulations and to facilitate and encourage compliance by covered entities. Therefore, proposed part 1630 is accompanied by a proposed appendix. This proposed appendix represents the Commission's interpretation of the issues discussed and the Commission will be guided by it when resolving charges of employment discrimination. The proposed Appendix addresses the major provisions of the regulations and explains the major concepts of disability rights.

One especially complex area for which the Commission has attempted to provide additional definitions and parameters involves the question of how to determine whether an employer regards a particular individual as having an impairment that substantially limits the major life activity of working. This question arises only when the individual is being regarded as substantially limited in working as opposed to substantially limited in any of his or her other major life activities. Also, it does not apply when an individual has an actual disability, or has a record of being an individual with a disability. The Commission has proposed, in the appendix to part 1630, that an employer be considered to regard an individual as substantially limited in the major life activity of working if the employer's qualification standard excluding individuals with a particular impairment, would, if assumed to be generally applied by employers facing comparable hiring decisions, exclude the individual from a class of jobs or from a broad range of jobs in various classes. The Commission invites specific comment on this proposal.

More detailed guidance on specific issues will be forthcoming in the Commission's Compliance Manual. Several Compliance Manual sections and policy guidances on ADA issues are currently under development and are expected to be issued prior to the effective date of the Act. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and of qualified individual with a disability; reasonable accommodation and undue hardship, including such matters as the scope of reassignment and supported employment; and pre-employment inquiries.

To assist us in developing this guidance, the Commission requests comment from disability rights organizations, employers, unions, State agencies concerned with employment or worker's compensation practices, and interested individuals on the following specific questions concerning the application of Title I of the ADA.

Insurance

1. What are the current risk assessment or classification practices with respect to health and life insurance coverage in the area of employment?
2. Must risk assessment or classification be based on actuarial statistics?
3. What is the relationship between "risk" and "cost"?
4. Must an employer or insurance company consider the effect on individuals with disabilities before making cost saving changes in its insurance coverage?

Worker's Compensation

1. Is submission of medical information to worker's compensation offices a permissible use of information obtained as a result of a medical examination or inquiry?
2. Is an inquiry into the history of an individual's worker's compensation claims a prohibited pre-employment inquiry? Is such an inquiry ever permissible as an inquiry that is job-related and consistent with business necessity?
3. What has been the experience of federal contractors subject to section 503 of the Rehabilitation Act with respect to State worker's compensation requirements?

Collective Bargaining Agreements

1. Can the effect of a particular accommodation on the provisions of a collective bargaining agreement ever be considered an undue hardship? For example, may an employer decline to restructure a job or refuse to grant light duty because to do so would violate seniority or other provisions of the collective bargaining agreement?
2. What is the relationship between collective bargaining agreements and the accommodation of reassignment to a vacant position?
3. Should a position be considered "vacant" when the employer has other obligations, such as consent decrees or arbitration agreements, with respect to filling the position?
4. If a necessary reasonable accommodation is challenged as a violation of a collective bargaining agreement, would the employer or union violate the confidentiality requirements

of the ADA by explaining that the accommodation was made to comply with the ADA?

Executive Order 12291 and Regulatory Flexibility Act

The Commission has determined that this proposed rule will not exceed the threshold level of \$100 million and thus is not a major rule for the purposes of Executive Order 12291. In making this determination the Commission prepared a Preliminary Regulatory Impact Analysis. The text of the Analysis appears below.

The Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Preliminary Regulatory Impact Analysis

Executive Summary

The following analysis estimates three economic effects likely to result from the regulation implementing Title I of the Americans with Disabilities Act. Reasonable accommodation expenses are estimated at approximately \$16 million, productivity gains are estimated at more than \$164 million and decreased support payments and increased tax revenue is estimated at about \$222 million. Lost benefits of not promulgating the rule could exceed \$400 million.

It appears that the rule is unlikely to have a significant economic impact on smaller entities. Because small entities employ fewer workers, the chance that an individual small business will be required to take reasonable accommodation is quite low. Further, the availability of tax credits, the two-year exemption period and the lack of reporting requirements all reduce the economic effect of the rule on these firms.

Introduction

The Equal Employment Opportunity Commission (EEOC) has drafted regulations to implement title I of the Americans with Disabilities Act (ADA), requiring equal employment opportunity for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities. The Commission is required by the ADA to issue regulations to enforce Title I within one year of the date of enactment. The regulation raises no issues for discretionary rulemaking. Title I of the

ADA is an unusual statute in that it contains a level of detail more commonly found in regulations, leaving very little room for regulatory discretion, and thus limits regulatory costs to those preset by the Congress in its choice of statutory requirements. The regulation merely explains and provides guidance on the statutory requirements by relying primarily on existing case law,¹ which is another limitation on Commission discretion in constructing the regulation.

The purpose of this preliminary regulatory impact analysis is to determine the costs and benefits of the proposed rule as required by Executive Order 12291, 46 FR 131391 (1981). This preliminary analysis suffers from a number of constraints. The ADA establishes very stringent time frames for developing implementing regulations. The limited time available necessitates the use of very rough estimates that can readily be drawn from existing literature. Additionally, a lack of regulatory alternatives available to the Commission and a scarcity of data relevant to the regulation at hand prevent this analysis from being an ideal application of cost benefit analysis. Even more limiting is the lack of a clear definition of costs associated with the rule as benefits, costs or simply transfers. Nevertheless, this analysis will address the five areas proscribed as necessary elements of a regulatory impact analysis by the Office of Management and Budget.² These areas are: (1) Statement of potential need for the proposal, (2) an examination of alternative approaches, (3) an analysis of benefits and costs, (4) rationale for choosing the proposed regulatory action, and (5) a statement of statutory authority. Also included in the final section of this preliminary regulatory impact analysis is a regulatory flexibility analysis.

Background

On July 26, 1990, the ADA was signed into law. The Commission invited public comment on the development of regulations through the publication of an advanced notice of proposed rulemaking on August 1, 1990. As directed by the legislative history, the regulations are modeled on those implementing section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104. Substantively, the regulations parallel

¹ Case law is a result of experiences encountered in implementing the Rehabilitation Act of 1973.

² "Appendix V, Regulatory Impact Analysis Guidance", *Regulatory Program of the United States Government*, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget, pp. 663-666.

the act. Succinctly stated, the act and the regulations prohibit employers from discriminating in employment decisions against qualified individuals with disabilities. This includes the requirement that employers make reasonable accommodation to known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. There are certain economic effects expected as a result of title I: (1) Reasonable accommodation expenses, (2) reduction of social welfare payments and an increase in tax revenues, and (3) increased labor productivity. As will be discussed, these costs can be viewed as being positive (benefits), negative (costs) or neutral (transfers). Government administrative costs in implementing Title I could also be considered an economic effect.

Statement of Potential Need for the Proposal

Beyond the legislative requirements for the regulations, Office of Management and Budget (OMB) guidance requires regulatory impact analyses to establish the potential need for a proposal by demonstrating that "(a) market failure exists that is (b) not adequately resolved by measures other than Federal regulation."³ The labor market failures at issue here include those addressed by other equal employment opportunity requirements. These failures have been explained in three different ways in the seminal works of Becker, Thurow and Arrow. These works originally addressed race discrimination but they are applicable to discrimination against disabled workers.⁴ Becker treats discrimination as a commodity in which employers, co-workers and consumers all have to determine their discrimination coefficient, that is, their taste for discrimination or how much discrimination will affect their utility.⁵ Here the market failure is the substitution of a human capital factor (that is, a qualification for or contributor to labor productivity) with factors

unrelated to productivity, such as race, sex, or disability. Becker indicates that individuals and firms are willing to accept the reduced productivity arising from using such factors because they prefer not to be associated (due to uncomfortableness or displeasure) with blacks, women or disabled workers in the work place. Becker's general theorem on market discrimination assumes that all employees in a given market are either perfect substitutes or perfect complements. Discrimination by employers converts minority or female wage rates into a net wage rate with the added costs of discrimination. The discrimination cost adds to the actual wage rate by adding costs from employees, customers, unions and others who prefer not to associate with certain classes of individuals. This cost of discrimination makes the black, female, or disabled worker more expensive to the firm and therefore stimulates the employer to discriminate in wages or to fail to hire these individuals. The effect on the labor market is that it artificially constricts the labor pool and allows a non-human capital factor to be considered in labor decisions, thus reducing gross productivity.

Thurow relies strongly on the marginal productivity theory in labor economics.⁶ The author explains that in studying discrimination, the important source of income is individual labor. Labor income is determined by labor's marginal productivity, its contribution to the firm's production. Firms are expected to set labor costs equal to labor's marginal productivity. As productivity increases, income should increase. In explaining employment discrimination, Thurow rejects Becker's notion of tastes for discrimination. Instead he sees the discriminator as a profit maximizer. Given a situation where firms pay black, female, ethnic or disabled workers less for comparable work, Becker would suggest that a portion of these workers' marginal productivity must go to buy off discrimination tastes. Thurow would argue that it occurs because the firm knows it can use that portion of a black, female, ethnic or disabled worker's marginal productivity as profit. Thurow's theory has limited applicability to hiring discrimination because if firms were able to capture wage disparities as profits, they would place a greater demand on these workers. This seems to be a particular weakness with respect to disabled

³ "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991, The Executive Office of the President, Office of Management and Budget, p. 653.

⁴ The term "disabled worker" is used to refer to applicants and employees covered by the act. It is not intended to be a legal term but is simply a term of convenience for this analysis.

⁵ Becker, Gary S. *The Economics of Discrimination*. The University of Chicago Press, 1957

⁶ Thurow, Lester C. *Poverty and Discrimination*. The Brookings Institute, Washington, DC, 1969.

workers because of the high rate of disabled unemployment. Nevertheless, Thurow provides a theoretical basis for observed wage disparities between equally qualified disabled and non-disabled workers. Thurow's theory also points out another market failure having to do with human capital. Although Thurow's theory could not create an artificially constricted labor market, as Becker's theory does, it would reduce returns on human capital investments for certain workers.⁷ As a result, disabled workers (and others that are discriminated against in the manner described by Thurow) would be less willing and less able to make human capital investments. This will result in a less qualified work force than would be expected in a perfectly competitive market. This again can have serious national productivity effects.

Arrow, like Becker, operates from an assumption that disparities between black and white employment (and in the present instance, disabled and non-disabled employment) are caused in part by discriminatory tastes, and that these discriminatory tastes have a certain utility for an employer and for the actors in an economy such as complementary workers.⁸ However, Arrow concludes that, if Becker's model is correct, in the long run the likely outcome or equilibrium point would be perfectly segregated labor pools and no disparity in wages. Noting that this condition cannot be observed in reality, he offers an alternative explanation: Imperfect information. Employers, according to Arrow's theory, may have a preconceived notion that black workers (or in this case, disabled workers) are less productive than white (or non-disabled) workers and will reduce black wages or employment opportunities accordingly. Arrow notes that in making employment decisions, an employer seeks information about candidates and this information has varying costs. Some information such as race, sex, ethnicity or disability status is particularly cheap, as the employer can usually observe these traits. In many instances the employer uses this cheap (and irrelevant) information to predict performance. The employer is able to do this and not have a disadvantage in the

market because other employers also use this cheap information and because the market is sufficiently noncompetitive as to allow the use of such inefficient information. By using the cheap information (race, sex, ethnicity, and/or disability), the employer saves money in the short run and ignores the long run productivity losses. This, of course, imposes a cost on society in the form of lost productivity that stems from the use of a less competitive labor market.

Burkhauser and Haveman indicate that there are other market failure rationales for government policy in the disability area.⁹ Three market failures are offered by the authors as general justification for government intervention. Burkhauser and Haveman view these three market failures as externalities. The first externality occurs, according to the authors, because when an individual becomes impaired, the costs of impairment become shared. Under this condition then one can view the welfare payments received by disabled workers as a type of externality and the reduction in these benefits caused by equal employment requirements will result in a decrease in this externality. While in some circumstances, such welfare payments may be viewed as a transfer, it is appropriate to view the reduction of the payments as a benefit as individuals become more responsible for the cost of their impairments and the externality is reduced. Expressed in another manner, the individual's income becomes more directly related to his/her productivity.

The second externality cited by these authors is relevant to the need to provide support for these individuals. In explaining this market failure, the authors point out that the amount individuals are willing to contribute to provide support is likely to depend on the contributions by others and an optimal level of support is not reached. This occurs as even individuals who prefer providing support will attempt to avoid such payments by taking a "free ride" on the contributions of others. The ADA's reasonable accommodation requirement might be viewed in this light. This requirement fixes the cost and eliminates the "free rider" problem. By selecting the employer to bear the cost the responsibility is fixed on the individual that receives the benefits of the disabled worker's productivity, thus approaching a more competitive market place. Ideally, however, the employee

⁷ Such human capital investments would include education and training. For a detailed discussion of human capital theory see, Mincer, Jacob, *Schooling, Experience and Earnings*, National Bureau of Economic Research, New York, 1974.

⁸ Arrow, Kenneth J. Arrow, "The Theory of Discrimination", *Discrimination in Labor Markets*, edited by Orley Ashenfelter and Albert Rees, Princeton University Press, Princeton, New Jersey, 1973, pp. 3-33.

⁹ Burkhauser, Richard V. and Robert H. Haveman, *Disability and Work: the Economics of American Policy*, The Johns Hopkins University Press, 1982, pp. 18-22.

would be expected to bear such costs. This brings us to the third externality cited by these authors. This problem stems from the fact that disabled workers are constrained in financing investments in human capital which are frequently reflected in reasonable accommodation, for example, the purchase of a TDD by a hearing impaired individual. The authors point out that due to the lack of economic well-being among disabled workers such investments by these workers are likely to be less than optimal. Transferring the cost to the employer through government intervention is more likely to produce the optimal investment.

Burkhauser and Haveman's view of disability as an externality raises a number of issues for calculating the cost benefit of the Title I regulations. Their view indicates that welfare disability payments can be viewed as an externality that forces others to share in the cost of an individual's disability. Analysts often view such payments as transfers. Instead, it may be possible to view the reduction of such payments as a social benefit reflecting the ability to have individuals bear the costs of their own disabilities. Also their view can be used to argue that at a certain level reasonable accommodation costs are simply pecuniary as employers bear human capital investment costs rather than the disabled worker. By having the employer, who is more sound financially, bear the costs, investments will be more optimal. Therefore, the reasonable accommodation costs which are required by title I can be viewed as those that would not be taken voluntarily by the disabled worker due to financial constraints and all such costs could be viewed as benefits. Viewing disability as an externality, changes the way that many researchers have defined costs and benefits of requiring equal employment opportunity for disabled workers. Traditionally, one would normally view the reduction in social welfare payments as a transfer rather than a benefit and one would view reasonable accommodation as a cost rather than a transfer with some benefits. As it is necessary to rely on prior studies to provide estimates of costs and benefits, Burkhauser and Haveman's view of market failures raises issues that cannot be readily resolved. This makes the calculation of a cost benefit ratio difficult as there is no clear consensus on what factors are benefits and which are costs. Rather than calculate a cost benefit ratio, it will be much more valuable to simply outline regulatory costs with the recognition that these costs will be viewed as

positive (benefits), as negative (costs), and as neutral (transfers) but with no definitive consistency in this view.

If the market failures, outlined above, exist, we might expect to see them reflected in disabled workers having lower employment status than similarly qualified non-disabled workers. Haveman and Wolfe make such a finding with respect to wages.¹⁰ These authors calculate the ratio of real earnings of disabled to non-disabled males controlling for age (a proxy for experience), years of education and race. For example, in 1984, disabled workers with 13 or more years of education earned only 71 percent of the earnings of a non-disabled worker with that amount of education. The disparities were even greater when educational levels were lower. Disabled workers with less than 12 years of education earned less than one-third of that earned by non-disabled workers with less than 12 years of education. Similarly, a study by Johnson and Lambrinos indicates that 35 percent of the difference between disabled and non-disabled workers' wages is due to discrimination.¹¹

Unemployment rates also reflect the lower employment status of the disabled, that would be expected particularly from Becker and Arrow's theories. The Congressional Research Service, using a 1978 Social Security Administration survey, reports that disabled men in the work force had an unemployment rate of 5.8 percent, in contrast to 3.5 percent for non-disabled men. Disabled women had an unemployment rate of 9.0 percent compared to 5.9 percent for non-disabled women.¹² Even these disparities do not completely capture the extent of unemployment, as disabled workers have been historically excluded from the work force. A Lou Harris poll found that two-thirds of disabled Americans between ages 16 and 64 are not working. Sixty-six percent of those not working say that they would like to work.¹³

¹⁰ Haveman, Robert and Barbara Wolfe, "The Economic Well-Being of the Disabled, 1962-1984", *The Journal of Human Resources*, Vol. 25 No. 1, 1990, pp. 32-64.

¹¹ Johnson, William G. and James Lambrinos, "Employment Discrimination", Society, March/April 1983, pp. 47-50.

¹² Digest of Data on Persons with Disabilities, Congressional Research Service, June 1984.

¹³ The ICD Survey of Disabled Americans, Bringing Disabled Americans Into Mainstream, a Nationwide Survey of the 1,000 Disabled People, ICD-International Center for the Disabled and Lou Harris and Associates, Inc., 1986.

In conclusion, discrimination against disabled individuals can be viewed, like discrimination against minorities and women, as a market failure due to a taste for discrimination, short run profit maximizing, and/or use of imperfect information. It can also be viewed as an externality where others pay for the cost of an individual's disability, which becomes particularly problematic without government intervention because optimal investments in human capital (including accommodations) are not made. The effect of this failure is a reduction in national productivity that stems from use of a constricted labor market, failure to accurately return investments on human capital, failure to make optimal investments in human capital and/or use of imperfect information to predict productivity. Additionally, all theories of discrimination recognized that society suffers when there is an inequitable work force.

An Examination of Alternative Approaches

The regulation implementing the ADA represents a direct adoption of statutory requirements. Little leeway is seen for discretionary rulemaking and hence regulatory alternatives. To demonstrate this limitation, it is useful to briefly examine the seven different regulatory alternatives recommended by the regulatory impact analysis guidance.¹⁴ The first alternative is the use of performance-oriented standards. While these types of standards have been shown to be useful alternatives for environmental regulation, they probably have limited utility in this area due to, among other factors, equity considerations for both disabled and non-disabled individuals.

The second type of alternative recommended in the regulatory impact analysis guidance is to impose different requirements for different segments of the regulated population. This is not a viable alternative for the subject regulation, as the rule represents a bare minimum compliance standard. Under somewhat similar regulations, like section 503 of the Rehabilitation Act of 1973, there are differing standards based on the value of the employer's Federal contracts. With more extensive compliance requirements like affirmative action programs, it is possible to have greater variation in regulatory requirements such as only

requiring employers with large contracts to have written plans. This type of gradation is not possible with a simple nondiscrimination requirement and the Commission is not given this authority in the ADA.

The third type of requirement recommended is alternative level of stringency. This type of regulation is not appropriate to the current rule for a number of reasons. First, the Act specifies level of stringency. Second, unlike pollution or risk in occupational safety, it is difficult to have little or to have much nondiscrimination. Third, even if graduated discrimination standards could be developed, it would result in the denial of individual rights to certain employees. Such a denial is certain to be tested in the courts, imposing significant costs on the government.

The fourth alternative is variation of effective dates of compliance. This has already been addressed in the Act. Any further variation would be confusing to the public and might also be challenged through litigation.

The fifth alternative is alternative methods of ensuring compliance. The proposed regulation makes no assumptions about methods of ensuring compliance. Considering that the statute is new and the Commission has no experience in implementing the Act, it is not reasonable at this time to develop, through regulation, alternative compliance techniques.

The sixth alternative is to provide informational measures. This is a viable approach, given that one of the cited market failures creating the need for the regulation is the use of imperfect information by employers. Additionally, the employer will have information needs when determining appropriate types of reasonable accommodation. Unfortunately, neither of these information needs is well met by government intervention. The employer is much more capable of determining the information needed to make personnel decisions. Given a prohibition against using cheap discriminatory information like an individual's disability, the employer will be best able to determine the most cost effective alternatives. With respect to information regarding reasonable accommodation, since accommodations are tailored to the individual, the most cost effective manner for designing them is information exchange between employee and employer. Increased information regarding reasonable accommodation solutions will both increase compliance and reduce compliance costs. It should be noted

¹⁴ "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991. The Executive Office of the President, Office of Management and Budget.

that information can be provided by the government and can aid employers' compliance efforts. The ADA imposes such a requirement on the Commission. The Commission will provide technical assistance to employers and general information through a variety of activities, including the development of a technical assistance manual, participation in conferences and the publication of booklets and brochures.

The seventh alternative is to create more market-oriented approaches. This alternative is difficult to apply to equal employment opportunity requirements, as the buying and selling of individual rights is different than the buying and selling of tax deductions or pollution rights. Some incentives, however, through tax credits and tax deductions related to the Act, are available and will be discussed in a later section.

Faced with a scarcity of alternatives, relevant guidance has been provided.

Ordinarily, one of the alternatives will be to promulgate no regulation at all, and this alternative will commonly serve as a base from which increments in benefits and costs are calculated for the other alternatives. Even if alternatives such as no regulation are not permissible statutorily, it is often desirable to evaluate the benefits and costs of such alternatives to determine if statutory change would be desirable.¹⁵

Therefore the two alternatives to be examined in this analysis are the proposed regulation and no regulation.¹⁶

Reasonable Accommodation Expenses

The title I substantive regulations contain compliance but not reporting requirements. Of compliance requirements, the cost borne by employers is reflected in their provision of reasonable accommodation. However, as the prior discussion of market failures indicates, it is not clear whether these costs should be viewed as positive or negative costs. While traditionally viewed as negative costs, Burkhauser and Haveman's perception that disability is an externality would make reasonable accommodation expenses a benefit. Nevertheless, there is rather abundant literature indicating

that accommodation expenses are normally quite low. The literature comes from a wide array of sources. For example, an official charged with implementing section 503 of the Rehabilitation Act noted that "there really is not any great cost attached to making accommodations."¹⁷ A major corporation reported that "The cost of most accommodations is nominal".¹⁸

The basic method to estimate the economic cost of reasonable accommodation is to multiply the expected number of accommodations by the expected cost of accommodations. Four variables are needed to estimate number and cost of accommodations: the expected proportion of employment opportunities to be gained by disabled workers, the number of employees covered, the average cost of accommodation, and turnover rates.

The expected proportion of employment opportunities to be gained by disabled workers is critical in determining the number of accommodations expected. Given some knowledge of relevant employment opportunities, this figure will indicate the number of opportunities that disabled workers would be expected to receive. Availability estimates of disabled workers range from 1.1 percent to 10 percent. The Digest of Data on Persons with Disabilities uses Social Security Administration data reports to estimate that 10 percent of those 18 to 64 years old who participate in the labor force are disabled.¹⁹ The much lower estimated of 1.1 percent availability represents that proportion of the federal work force having targeted disabilities.²⁰ The 10 percent availability figure is only appropriate if immediate and total compliance is expected. That is, as soon as the regulations are implemented, employers begin filling job vacancies with disabled workers at the same rate as these workers are available for employment (10 percent according to the estimate above). As few regulations ever achieve immediate and total compliance, it is useful to introduce another estimate that accounts for experience in compliance behavior. The 1.1 percent estimate

¹⁵ "Appendix V, Regulatory Impact Analysis Guidance", Regulatory Program of the United States Government, April 1, 1990-March 31, 1991. The Executive Office of the President, Office of Management and Budget, p. 656.

¹⁶ Because the alternative of no regulation appears to be intended, by OMB, to serve as a base for comparing regulatory alternatives, no regulation will be treated as if there was no legislation. While Title I of the ADA could be implemented without regulations, treating no regulation as no legislation will provide the most useful contrast. Additionally the effect of this alternative is more readily computed when viewed in this manner.

¹⁷ Rougeau, Weldon, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor, statement before Congress, Equal Employment Opportunity for the Handicapped Act of 1979: Hearings on S. 446 Before the Senate Committee on Labor and Human Resources, 96th Congress 1st Session 103 (1979) p. 103.

¹⁸ Equal to the Task, 1981 DuPont Survey of Employment: of the Handicapped, 1982, pp. 17-18.

¹⁹ Digest of Data on Persons with Disabilities, Congressional Research Service, June 1984.

²⁰ D'Innocenzio, Anne, "Accommodating Disabilities", Government Executive, October 1990, p. 2.

reflecting compliance of federal agencies may not be appropriate, as it is limited to targeted disabilities, is from a relatively unique labor market and also represents an extreme estimate. In its place, an estimate of the employment of disabled workers by federal contractors subject to Section 503 of the Rehabilitation Act can be used. A 1982 study conducted for the Department of Labor found that 3.5 percent of federal contractors' work forces were disabled. Note that this figure was reached nearly ten years after federal contractors were subject to Section 503.

The number of employees covered by title I is another variable necessary to estimate the number of expected accommodations. The impact of title I on the economy is limited because a large number of employees are already covered by Federal, State and local statutes that require equal employment opportunity for the disabled. Two estimates of newly covered employees are relevant.²¹ Twenty million employees not already covered by the Rehabilitation Act or State statutes comparable to the ADA will be covered by title I. If State statutes similar to ADA are included, only 15 million employees will be newly covered.²²

The cost of accommodation is, of course, critical to determining the influence of Title I on the nation's economy. (For this analysis, average cost of accommodation refers to the average cost per disabled employee, not average cost per accommodation. This is necessary to account for the large proportion of disabled workers who do not require accommodation). One estimate is provided by the Berkeley Planning Associates (BPA) survey of federal contractors subject to section 503.²³ The study provides a table with

percentage of accommodations within cost ranges. For example, most frequently cited are the first three ranges, where 51.1 percent of all accommodations are made at no cost, 18.5 percent at costs between \$1 and \$99 and 11.9 percent at costs between \$100 and \$499. Thus more than 80 percent of all accommodations cost less than \$500. The average cost of accommodation according to that report is \$304 when (1) mid-points of the published cost ranges are used for calculation, (2) it is recognized that at least one-half of disabled workers require no accommodation,²⁴ and (3) the highest cost range accounting for only 1.6 percent of accommodations is excluded as expenses of this caliber are likely to be structural changes that are probably covered by title III.

A second estimate can be developed from a study conducted for the Business Roundtable regarding Section 503 and other regulatory costs.²⁵ This study calculated that the annual cost of complying with section 503 was \$3,574,000 per year. Cost estimates specific to reasonable accommodations were not made. It would be expected that these costs are much higher than those required by title I because Section 503 requires federal contractors to take affirmative action. As affirmative action requirements necessitate costs such as reporting and affirmative action plan development that are not necessary under title I, this estimate is upwardly biased. To determine the average cost of accommodations, the number of annual employment opportunities in the work force of survey firms (2,800,000 employees) was estimated by using the monthly turnover rate of large firms, 0.8 percent,²⁶ to estimate that there were 22,400 employment opportunities each month, or 268,000 vacancies per year. Since the Berkeley Planning Associates study found that 3.5 percent of federal

²¹ Estimates were developed by the Commission's Office of Program Operations, Program Research and Surveys Division. The estimates begin from an initial estimate of the number of employers and employees subject to the Uniform Guidelines on Employee Selection Procedures. These figures can be shown to be consistent with estimates developed privately and for other purposes by Dunn and Bradstreet. Employers and their work forces are then classified depending on their coverage by State statutes resembling in some way the ADA.

²² As the analysis will depend on the number of workers likely to be affected by Title I, terms like "15 million newly covered employees" is used. The more accurate term might be "covered employers employing 15 million employees" as employers rather than employees will be covered by title I.

²³ A Study of Accommodations Provided to Handicapped Employees by Federal Contractors, Vol 1: Study Findings, Berkeley Planning Associates for the U.S. Department of Labor, Employment Standards Administration, June 17, 1982, p. 29.

²⁴ Not all disabled workers require accommodation. The ICD Survey of Disabled Americans, Bringing Disabled Americans Into the Mainstream, a Nationwide Survey of 1,000 Disabled People, ICD-International Center for the Disabled and Lou Harris Associates, Inc., 1986 reports that only 35 percent of disabled persons who are employed, report some sort of accommodation. Another study (Finnegan, Daniel, Robert Reuter and Gail Armstrong Taft, "The Costs and Benefits Associated with the Americans with Disabilities Act", Quality Planning Associates, September 11, 1989) indicates that one-half of disabled employees would require accommodation.

²⁵ Cost of Government Regulation Study for the Business Roundtable, Arthur Andersen & Co. for the Business Roundtable, (March 1979).

²⁶ Turnover rates used in this analysis are from "BNA's Job Absence and Turnover Report—2nd Quarter 1990", Bulletin to Management, The Bureau of National Affairs, September 13, 1990, pp. 293.

contractor's work forces were disabled, it is assumed that 3.5 percent of these vacancies went to disabled individuals. Thus the \$3,574,000 required to comply with section 503 can be divided among 9,408 disabled employees for an average cost of \$380.

Using an analysis of Section 504 costs, a study projecting the impact of the "Americans with Disabilities Act of 1989" estimated that the average cost of accommodations was \$200 but this average cost did not account for their estimate that one-half of accommodations require no cost.²⁷ Thus the average cost would actually be \$100.

Relevant estimates then of the average cost of accommodation are \$304, and \$380, and \$100. These estimates are quite consistent considering the divergency of the sources. The mean of these three estimates is \$261. This figure can be used to predict accommodation expenses that might result from title I.

If we count as newly covered employees those without either a comparable or similar State statute, then 15 million employees will annually produce 1,800,000 vacancies applying a 1 percent monthly turnover rate. If we assume the same level of compliance as Berkeley Planning Associates observed by federal contractors, then 3.5 percent or 63,000 vacancies would go to disabled workers, resulting in annual accommodation expenses of \$16,443,000.

Productivity Gains

Title I is expected to increase productivity because employers will use a larger labor pool, and there will be more optimal investments in human capital. In order to estimate productivity gains from the Act, it must be assumed that as the marginal productivity theory of labor economics suggests, a worker's increased marginal productivity will equal the worker's increased marginal income. Thus, the increased wages of disabled workers after ADA will indicate increased productivity. This approach was used by O'Neill in his finding that benefits far outweigh costs in the Department of Health, Education, and Welfare's (HEW) implementation of section 504.²⁸ He estimated that the \$50

million required to implement the employment provisions (reasonable accommodation expenses) would yield \$500 million in benefits (increased productivity). Therefore the benefits are 10 times greater than the costs. Given the range of cost benefit estimates cited by Martin, O'Neill's estimate is conservative. His estimate is particularly relevant to the Title I rule since it is modeled on the section 504 regulation. If O'Neill's cost/benefit ratio is applied to the reasonable accommodation expenses presented above, increased productivity that can be attributed to the rule can be estimated at \$164,430,000.

Decreased Support Payments

The social benefits of decreasing support payments and increasing tax revenues by expanding the employment of the disabled seem particularly important currently as Federal, state and local governments are frequently confronting budget deficits. Reduced support and increased tax payments have been examined in various contexts involving legislation affecting disabled workers.

Hearne explains the setting for understanding the gains to be achieved if support payments are reduced.

If these billions of dollars [spent on an annual basis for supplemental social security income for the disabled] are continually spent to keep [the disabled] * * * population alive and not spent by Congress or by the States on access to employment, on transportation, on the real issues that affect disabled people, it is far more costly, since there is no return with this money. If this money is turned into vocational rehabilitation funds [or funds for reasonable accommodation] and individuals are placed in jobs, they become taxpayers. So that there is a two-fold benefit: One, they are taken off the public assistance rolls; and two, not only are they functionally employed and attaining independent lives as well as economic independence, but they are also paying taxes and broadening the tax base.

In 1974 the three public benefit programs—public assistance, which is the State welfare, AFDC and home relief; social security disability insurance, which is primarily paid to injured workers; and SSI which, as I mentioned earlier, is the benefit program which goes to most disabled people unemployed—payments amounted to a total of about \$8.3 billion.²⁹

A summary of research regarding section 504 of the Rehabilitation Act of 1973 provides an indication of tax revenues lost as a result of no regulation.

²⁷ Finnegan, Daniel, Robert Reuter and Gail Armstrong Taff, "The Costs and Benefits Associated with the Americans with Disabilities Act", Quality Planning Associates, September 11, 1989, p. 38.

²⁸ O'Neill, Dave M., "Discrimination Against Handicapped Persons, the Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance", Public Research Institute, February 18, 1976.

²⁹ Hearne, Paul G., statement in Civil Rights Issues of Handicapped Americans: Public Policy Implications, consultation before the U.S. Commission on Civil Rights, Washington, DC, May 13-14, 1980, p. 200.

One study, commissioned by the Department of Health, Education, and Welfare's Office of Civil Rights estimated that eliminating discrimination against handicapped people in HEW funded grant programs would yield \$1 billion annually in increased employment and earnings for handicapped people. In addition to increasing the gross national product it has been estimated that such an earnings increase by handicapped workers would result in some \$58 million in additional tax revenues to Federal, State, and local governments.²⁰

In support of a national rehabilitation program in 1973, Senator Cranston noted the same increase in tax revenues but also addressed the reduction in support payments. "And these figures do not reflect the approximately \$33 million in savings to Federal and State governments in 1972 caused by removal of many rehabilitation persons from the public assistance rolls."²¹

A case study, while not providing the overall savings from reducing support payments, provides concrete evidence that such reductions will occur. The Rehabilitation Institute of Chicago worked towards the placement of 176 disabled workers. The gainful employment of these relatively few individuals was estimated to result in a savings of \$1,058,000 in disability benefits in one year.²²

In a similar vein, a hypothetical example explains the long range benefits of only hiring three disabled employees.

As an example, take a disabled person who starts work at a \$10,000 per annum job. He or she will pay slightly over \$2,000 in taxes and will no longer collect \$6,000 in [support] benefits. The gain to society is in general at least \$8,000 per year for the remainder of this person's working life. Assuming a starting age of 25, this means 40 years of constructive work for a minimum net savings of \$320,000. Using this simple analogy, hiring only three disabled people will eventually save society one million dollars.²³

It was estimated above that title I will generate 63,000 employment opportunities for the disabled. It was also noted that two-thirds of disabled Americans are not working and that of these, two-thirds say they would like to work. Thus we might expect as much as

44 percent (0.66 times 0.66) or 27,720 of these employment opportunities to go to individuals receiving support payments. Using Tucker's modest estimate of tax and support payment savings of \$8,000 per worker results in total savings of \$221,760,000 per year. This is an extremely rough estimate, but it may be conservative. For example, tax revenues would be based on income, and the assumption that the average income of the newly employed disabled workers would be \$10,000 is clearly too low.

Benefits of Equity

The utility of cost benefit analysis for equal employment opportunity rules has been questioned, as it is difficult to quantify benefits like equity. This argument has been applied specifically to equal employment opportunity for the disabled.

The degree to which cost-benefit analysis may be applied appropriately to government programs for handicapped people has been the subject of controversy. Many authorities agree that the analysis of financial costs and benefits is an important consideration in selecting the most efficient alternative among several choices for reaching a particular goal. It is not so clear, however, that using cost-benefit analysis to select societal goals or evaluate social programs is appropriate. Cost benefit analysis strongly favors quantifiable data, usually dollars and cents, on the theory that marketplace prices, fixed by supply and demand, are more reliable than subjective value judgments. Many social programs exist, however, because the marketplace does not adequately provide needed public services or because it is unfairly biased.²⁴

It is clear that even if one accepts cost benefit analysis for the title I rule, the benefits of the regulation will be vastly underestimated due to the inability to quantify the value of a more equitable labor market.

Administrative Costs

OMB guidance indicates that one cost that should be considered in projecting regulatory impact is government administrative costs. The main administrative cost from implementation of title I is the salaries for EEOC employees investigating charges received from individuals alleging discrimination in violation of title I. While, other substantial administrative costs, such as staff training and information system modifications, will be incurred during the initial implementation of title I, these costs will eventually decline. EEOC has estimated that the cost of the first full year of implementation is roughly \$25 million.

²⁰ Accommodating the Spectrum of Individual Abilities, United States Commission on Civil Rights, Clearinghouse Publication 81, 1983, p. 75.

²¹ Statement of Senator Cranston, 119 Congressional Record, 24,586, July 18, 1973.

²² Special Report: Disability and Employment, Facts About Costs and Benefits, The President's Committee on Employment of the Handicapped, Washington, D.C. 1980.

²³ Tucker, Bonnie P., "Section 504 of the Rehabilitation Act After Ten Years of Enforcement: the Past and the Future", University of Illinois Law Review, vol 1989, no 4, 1989, p. 600.

²⁴ Accommodating the Spectrum of Individual Abilities, United States Commission on Civil Rights, Clearinghouse Publication 81, September 1983, p. 73.

This excludes some one-time only expenses such as modification of management information systems. Table 1 summarizes title I costs, both positive, negative and neutral from the three major effects on the economy plus EEOC administrative costs.

TABLE 1.—SUMMARY OF ANNUAL EFFECTS ON THE ECONOMY AS A RESULT OF TITLE I

Reasonable Accommodation Expenses.....	\$16,443,000
Productivity Gains.....	\$164,430,000
Decreased Support Payments and Increased Taxes.....	\$221,760,000
EEOC Administrative Costs.....	\$25,000,000

Cost Benefit Ratio

Due to the inability to clearly define costs as positive or negative, it is not particularly useful to calculate a cost benefit ratio. However, there is considerable evidence that the cost/benefit ratio of the proposed regulation is positive. Martin indicates that "conservative estimates of the ratio of benefits to costs for such requirements have ranged between 8 to 1 to 35 to 1."³⁵ Irrespective of how the economic effects outlined above are labelled, the cost benefit ratio of title I is clearly positive.

The No Regulation Alternative

In examining the "no regulation" alternative, there are clearly no costs. Therefore the analysis focuses on lost benefits, that is, social benefits that will be lost if the regulation is not promulgated. As discussed earlier, it is possible to treat each of the effects on the economy except administrative costs borne by EEOC as benefits. This approach would indicate that the annual total benefits lost by not promulgating title I is \$402,653,000. If a more traditional approach is taken and reasonable accommodation expenses are counted as costs rather than benefits, the lost annual benefits are still quite substantial at \$386,190,000.

Biases in Estimates

It is important to briefly explain biases in the estimates provided above. First, the estimates of economic impact do not account for the transferability of accommodations. Whenever an accommodation is made, there is a possibility that the accommodation can

be used for future hires. This suggests that while the provided expense estimates might be appropriate during an earlier period of compliance, future expenses will be much lower. It is also probable that some accommodations may be used by more than one individual with a disability, for example, a sign interpreter may serve several hearing impaired employees.

Second, while in the analysis above, costs of some structural accommodations were eliminated, some of the less expensive of these accommodations may still be included in the estimates. Since the elimination of these barriers are likely to be made as a result of title II or title III of the ADA, they overstate costs under the employment provisions of title I.

Third, the number of newly covered employees, used in this analysis, does not exclude employees who are already covered by local statutes comparable or similar to the ADA. Failure to account for local statutes overestimates the number of title I required accommodations. Thus, the economic effect of accommodation expenses, productivity gains and reduction in support payments and increased tax revenues may be less than estimated. Fourth, reasonable accommodation estimates are based, in two instances, on experience implementing section 503. This section contains an affirmative action requirement, and the Department of Labor requires written affirmative action plans. It is possible that the costs of meeting the affirmative action requirement are, in part, reflected in contractors' estimations of the cost of reasonable accommodation. This is certainly the case when using the Business Roundtable estimate.

Fourth, the estimates do not account for tax deductions or tax credits available to firms making accommodations. Tax credits are available for small businesses that are equal to 50 percent of reasonable accommodation expenses between \$250 and \$10,250. The effect of these credits, using Berkeley Planning Associates breakdown of accommodations by cost ranges, is demonstrated in Table 2. It is based on an assumption that those eligible for the credit are employing between 15 and 25 employees. There are only one million newly covered employees in this group. The 1 percent monthly turnover rate and 3.5 percent availability rate indicate that the expected number of accommodations for these firms is 2,100. Thus the 63,000 new employment opportunities for disabled workers expected as a result of ADA, would produce tax credits offsetting

³⁵ Martin, Mark E., "Accommodating the Handicapped: the Meaning of Discrimination Under Section 504 of the Rehabilitation Act", (a note) New York University Law Review, Vol. 55, November 1980, p. 901.

reasonable accommodation expenses by about \$372,292. The tax credits are underestimated, as some firms with more than 25 employees would qualify. Tax deductions will also lower costs, but sufficient information to estimate the full effect of the deductions is not readily available. While tax credits and deductions can be viewed as transfers rather than pecuniary costs, it indicates a lower level of expense may be required by businesses.

TABLE 2.—CALCULATION OF TAX CREDITS

Percent	No.	Cost (dollars)	Tax credit	Total tax credit
11.9.....	250	299.5	\$149.75	\$37,422.52
6.2.....	130	749.5	374.75	48,792.45
4.3.....	90	1,499.5	749.75	67,702.43
3.8.....	80	3,499.5	1,749.75	139,630.05
1.0.....	21	7,499.5	3,749.75	78,744.75
Total..				\$372,292.20

Finally, no attempt was made to place the estimates of economic effects in constant dollars. While a number of estimates are based on data collection around 1980, the estimate of administrative costs is very recent. As the rate of inflation during the 1980's was relatively low (for example, 5.5 percent from 1980 to 1985) and the estimates are quite rough, adjustments for inflation would not be useful. However, the failure to make adjustments will tend to overestimate administrative costs relative to other estimated costs.

Rationale for Choosing the Proposed Regulatory Action

As mentioned previously, the ADA does not provide much discretion in the Commission's development of implementing regulations. Therefore the true rationale for the proposed regulatory action is legislative direction. However, absent this direction, the adopted course of action seems to be the most appropriate one. Whether reasonable accommodation expenses are defined as costs or benefits, the title I regulation is likely to have benefits exceeding costs.

A Statement of Statutory Authority

The statutory authority is title I of the Americans With Disabilities Act.

Impact on Smaller Businesses

According to guidance published by the Small Business Administration, a Regulatory Flexibility Analysis (RFA) requires:

the agencies of the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses.

If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared and published in the Federal Register describing the impact.²⁰

A key rationale for this requirement is found in section 2(a)(2) of the Regulatory Flexibility Act,

uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources.

The cost of reasonable accommodation is not uniform across firms but dependent on the number of disabled applicants and employees who need an accommodation. This will ultimately be related to the number of employment opportunities. Therefore a significant economic impact on small entities is not expected.

Because smaller firms have fewer employees, the rule can be expected to impose fewer costs on these employers as they will have fewer employment opportunities and fewer applicants and employees who need an accommodation. The values used to calculate reasonable accommodation expenses can be used as an example. Recall 15 million newly covered employees are expected under title I. Of these, 14 million work for firms with more than 25 employees. There were 56,100 such firms. Based on a 1 percent monthly turnover rate, the expected proportion of employment opportunities to be gained by disabled workers of 3.5 percent and recognizing that 50 percent of disabled workers require no accommodation, these firms would be expected to make 29,400 accommodations per year, or 0.524 accommodations per firm. Firms with between 15 and 25 employees only employ one million of the newly covered employees. Based on the same turnover and availability rates, these employers, which number 141,200, would be expected to make 2,100 accommodations per year, or 0.015 per firm. So on average, smaller firms would rarely make an accommodation and larger firms are more than 30 times more likely to make an accommodation. Further, firms with fewer than 15 employees are not covered by the title I regulation and would not be required to make any accommodations.

The economic impact of the rule is also less on smaller firms, those

²⁰ "The Regulatory Flexibility Act", U.S. Small Business Administration, October 1982, p. 11.

between 15 and 25 employees, than on larger firms because smaller firms are not covered during the first two years that title I is in effect. This lag benefits smaller businesses by directly reducing the economic burden and by allowing smaller employers to benefit from technological or production innovations in accommodations made by larger firms during the period when smaller firms are not covered.

Finally, it should be noted again that the title I rule has no reporting requirements. A major concern regarding the inequitable impact of regulation on small firms is that reporting and accompanying record keeping requirements can be as costly to smaller firms as large ones. The absence of reporting requirements eliminates this concern for the title I regulation.

In conclusion, the economic impact of the rule on small entities is not expected to be significant, with the vast majority of small businesses not expected to make an accommodation during a year. Additionally, there are aspects of the rule that result in small businesses having lower compliance costs than large businesses.

List of Subjects in 29 CFR Part 1630

Equal employment opportunity,
Handicapped, Individuals with
disabilities.

For the Commission,
Evan J. Kemp, Jr.,
Chairman.

Accordingly, it is proposed to amend 29 CFR chapter XIV by adding part 1630 to read as follows:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

1630.1 Purpose, applicability, and construction.

1630.2 Definitions.

1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

1630.4 Discrimination prohibited.

1630.5 Limiting, segregating, and classifying.

1630.6 Contractual or other arrangements.

1630.7 Standards, criteria, or methods of administration.

1630.8 Relationship or association with an individual with an individual with a disability.

1630.9 Not making reasonable accommodation.

1630.10 Qualification standards, tests, and other selection criteria.

1630.11 Administration of tests.

1630.12 Retaliation and coercion.

1630.13 Prohibited medical examinations and inquiries.

Sec.

1630.14 Medical examinations and inquiries specifically permitted.

1630.15 Defenses.

1630.16 Specific activities permitted.

Appendix to part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act.

Authority: 42 U.S.C. 12116.

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction.*—(1) *In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands and the Commonwealth of the Northern Mariana Islands.

(e) *Employer.*—(1) *In general.* The term "employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more

calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits.*—(1) The term “substantially limits” means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of “working”—

(i) The term “substantially limits” means significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors should be considered in determining whether an individual is substantially limited in the major life activity of “working”:

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of

this section but is treated by a covered entity has having such an impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience and education requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) *Essential functions*.—(1) *In general*. The term “essential functions” means primary job duties that are intrinsic to the employment position the individual holds or desires. The term “essential functions” does not include the marginal or peripheral functions of the position that are incidental to the performance of primary job functions.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence that may be considered in determining whether a particular function is essential includes but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The work experience of past incumbents in the job; and/or

(vi) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation*.—(1) The term *reasonable accommodation* means:

(i) Any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position such qualified individual desires, and which will not impose an undue hardship on the covered entity's business; or

(ii) Any modification or adjustment to the work environment, or to the manner or circumstances under which the

position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position, and which will impose an undue hardship on the operation of the covered entity's business; or

(iii) Any modification or adjustment that enables a covered entity's employee with a disability to enjoy the same benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the covered entity's business.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship*.—(1) *In general*. *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered*. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and cost of the accommodation needed under this part;

(ii) The overall financial resources of the site or sites involved in the provision of the reasonable accommodation, the number of persons employed at such site, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the site or sites in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties and the impact on the site's ability to conduct business.

(3) *Site* means a geographically separate subpart of a covered entity.

(a) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired. Qualification standards may include a requirement that an individual not pose a direct threat to the health or safety of the individual or others. (See § 1630.10 Qualification standards, tests and other selection criteria).

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual with a disability poses a "direct threat" should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm; and
- (3) The likelihood that the potential harm will occur.

§ 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) *Drug* means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(2) *Illegal use of drugs* means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration.

This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms *disability* and *qualified individual with a disability* may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b) (1) or (2) of this section is no longer engaging in the illegal use of drugs. (See § 1630.16(c) Drug testing).

(d) *Disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) *Homosexuality and bisexuality* are not impairments and so are not disabilities as defined in this part.

§ 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term *discrimination* includes but is not limited to the acts in §§ 1630.5 through 1630.13 of this part.

§ 1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

§ 1630.6 Contractual or other arrangements.

(a) *In general.* It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) *Contractual or other arrangement defined.* The phrase "contractual or other arrangement or relationship" includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) *Application.* This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

§ 1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

§ 1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

§ 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the ADA.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

§ 1630.10 Qualification standards, tests, and other selection criteria.

(a) *In general.* It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

(b) *Direct threat as a qualification standard.* Notwithstanding paragraph (a) of this section, a covered entity may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others. (See § 1630.2(r) defining "direct threat").

§ 1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

§ 1630.12 Retaliation and coercion.

(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

§ 1630.13 Prohibited medical examinations and inquiries.

(a) *Pre-employment examination or inquiry.* Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) *Examination or inquiry of employees.* Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability, unless the examination or inquiry is shown to be

job-related and consistent with business necessity.

§ 1630.14 Medical examinations and inquiries specifically permitted.

(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination, if all entering employees in the same job category are subjected to such an examination regardless of disability.

(1) Information obtained regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination may be used only in accordance with this part.

(3) Medical examinations conducted in accordance with this Section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See § 1630.15(b) Defenses to charges of discriminatory application of selection criteria).

(c) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the

ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this Part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§ 1630.4–1630.8 and 1630.11–1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria.* It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criteria, or policy has a disparate impact on an individual or class of individuals with disabilities that the challenged standard, criteria or policy has been shown to be job-related and consistent with business necessity and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) *Additional defenses.* It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by §§ 1630.14 or 1630.16.

§ 1630.16 Specific activities permitted.

(a) *Religious entities.* A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

(b) *Regulation of alcohol and drugs.* A covered entity:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1986 (41 U.S.C. 701 et seq.);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations of the Departments of Defense and

Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) *Drug testing.*—(1) *General policy.* For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of drug tests by a covered entity to its job applicants or employees is not a violation of § 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity from conducting drug testing of job applicants or employees for the illegal use of drugs or from making employment decisions based on such test results.

(2) *Transportation Employees.* This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a drug test, except information regarding the illegal use of drugs, is subject to the requirements of § 1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases; food handling jobs.*—(1) *In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which can be transmitted through the handling of food. If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue

to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on State or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans.*—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law regulating insurance.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law regulating insurance.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act

Introduction

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 (1990), which prohibits employment discrimination on the basis of disability. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of these regulations in order to ensure that qualified individuals with disabilities understand their

rights under these regulations and to facilitate and encourage compliance by covered entities. This appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The appendix addresses the major provisions of the regulations and explains the major concepts of disability rights.

The terms "employer" or "employer or other covered entity" are used interchangeably throughout this document to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute which requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and these regulations is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term "disabilities" rather than the term "handicaps" used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these are equivalent. As noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 * * * H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter House Judiciary Report]; see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 465 part 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Labor Report].

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense for failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to collect information

required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense for failing to meet a higher standard under the ADA. See House Labor Report at 135; House Judiciary Report at 69-70.

The ADA does not preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this Part, and are designed to protect the public health from individuals who pose a direct threat which cannot be eliminated by reasonable accommodation to the health or safety of others. However, the ADA does preempt inconsistent requirements established by state or local law for safety or security sensitive positions. See Senate Report at 27; House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any state or local law that imposes prohibitions or limitations on the eligibility of qualified individuals with disabilities to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her because of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.

Sections 1630.2(a)-(f) Commission, Covered Entity, etc.

The definitions section of the regulations includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," "Employer" and "Employee." These terms are to be given the same meaning under the ADA that they are given under title VII. The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (e.g., employer, employment agency, etc.) are applicable to the ADA.

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this regulation. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2)

has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment.

To understand the meaning of the term "disability," it is necessary to understand, a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines or prosthetic devices. See Senate Report at 23; House Labor Report at 52; House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. Nor does the definition include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of these regulations. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-23.

Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, breathing, learning, working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. See

Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person in the general population. For example, an individual who uses artificial legs is substantially limited in the major life activity of walking because the individual can only perform that major life activity in a significantly restricted manner, *i.e.*, only with the use of prosthetic devices. An individual is also substantially limited in the major life activity of walking if the individual can only walk for very brief periods of time. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual can only perform major life activities with the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

The regulation notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly that "impact" of the impairment would be the resulting permanent limp.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who has once been able to walk at an

extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

An individual who is not substantially limited with respect to any other major life activity may be substantially limited with respect to the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis. If an individual is substantially limited in another major life activity, it is not necessary to consider whether he or she is substantially limited in working.

The regulation lists specific factors that should be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical areas to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, a surgeon who is no longer able to perform surgery because of an impairment that results in a slightly shaky hand would not be substantially limited in working merely because of the inability to perform this chosen specialty. This is so because the surgeon would only be excluded from a narrow range of jobs, and would still be able to perform various other positions, in the same class, utilizing his or her training as a physician. For instance, the surgeon could continue to examine patients and advise on

the need for surgery, or teach medicine or surgical techniques within the same geographical area. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform a particular specialized job. See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (8th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

Section 1630.2(k) Record of a Substantially Limiting Condition

The second part of the definition provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have

been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House Judiciary Report at 29.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical employment or other records.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under these regulations. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in these regulations. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of these regulations, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

- (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

- (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

- (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment. Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, an employee with controlled high blood pressure that is not, in fact, substantially limiting who is reassigned to less strenuous work because of the employer's unsubstantiated fears that the individual will suffer a heart attack if he

or she continues to perform strenuous work would be "regarded as" disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitude of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

In determining whether or not an individual is regarded as substantially limited in the major life activity of working, it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used. The determination of whether there is a substantial limitation in working is contingent upon the number and types of jobs from which the individual is excluded because of an impairment. An assessment of the number and types of jobs from which an individual "regarded as" disabled in working would be excluded can only be achieved if the qualification standard of the employer charged with discrimination is attributed to all similar employers. Were it otherwise, an employer would be able to use a discriminatory qualification standard as long as the standard was not widely followed.

For example, suppose an individual has a heart murmur that has gone undetected and has not caused any limitations on the individual's activities. In the course of a routine medical examination given to all newly employed heavy machine operators, the murmur is discovered. The employer then withdraws the offer of employment because it believes the heart murmur disqualifies the individual from operating the heavy machinery. Assuming all employers hiring heavy machine operators use this standard, the individual would be excluded from the broad range of jobs requiring the use of heavy machinery. Therefore, the employer is regarding the impairment as a substantial limitation of the major life activity of working and has acted on the basis of that perception.

Frequently Disabling Impairments

The ADA, like the Rehabilitation Act of 1973, does not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

There are, however, a number of impairments that far more often than not result in disability. The following list is provided to indicate the types of impairments that usually are disabling. However, an individual should not automatically be considered an individual with a disability merely because he or she has one of the impairments indicated on this list. Rather, such an individual is an individual with a disability only if the impairment impacts on the individual to such a degree that it substantially limits a major life activity. Commonly disabling impairments include substantial orthopedic, visual, speech, and hearing impairments, tuberculosis, HIV infection, AIDS, cerebral palsy, epilepsy, muscular dystrophies, multiple sclerosis, cancers, heart disease, diabetes, mental retardation, and emotional or mental illness.

By contrast, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare and limiting circumstances, obesity is not considered a disabling impairment.

Section 1630.2(m) Qualified Individual with a Disability

The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 64-65. (See Section 1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform

the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal or peripheral functions of the position. House Labor Report at 55.

Section 1630.2(n) Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter the position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in the regulation.

The first factor is whether the reason the position exists is to perform that function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function, since this is the only reason the position exists.

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of employees is low, or because of the fluctuating demands of the business operations. For example, if an employer has a relatively small number of employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done. See *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures. See *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987).

The third factor is the degree of expertise or skill required to perform the function. In certain professions and highly skilled positions the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function.

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. The regulation lists various types of evidence, such as an established job description, that may be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.

The employer's judgment as to what functions are essential and written job descriptions prepared before advertising or interviewing applicants for the job are among the relevant evidence to be considered in determining whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is also relevant to the determination of whether a particular function is essential. See H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 58 (1990) [hereinafter Conference Report]; House Judiciary Report at 33-34. See also *Hall v. U.S. Postal Service*, 857 F.2d 1073 (8th Cir. 1988).

The time spent performing the particular function may be an indicator of whether that function is essential. For example, if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequence of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See section 1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to type 75 words per minute, it will not be called upon to explain why a typing speed of 65 words per minute would not be adequate. Similarly, if a hotel requires its service workers to clean 16 rooms a day, it will not have to explain why it chose a 16 room requirement rather than a 10 room requirement. However, if an employer does not require 75 words per minute typing or the cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is

alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

Section 1630.2(o) Reasonable Accommodation

An individual is considered a "qualified individual with a disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy the same benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in these regulations prohibits employers or other covered entities from providing accommodations beyond those required by these regulations.

The regulations list the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, providing personal assistants—such as a page turner or travel attendant, and providing reserved parking spaces. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

The accommodations included on the list of reasonable accommodations are generally self-explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, etc., may be required as reasonable accommodations.

Another of the potential accommodations listed is "job restructuring." An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a

qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62.

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979).

Reassignment to another vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified and if the position is vacant. An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31-32; House Labor Report at 63.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in § 1630.9 Not Making Reasonable Accommodation. Section 1630.2(p) Undue Hardship

An employer or other covered entity is not required to provide an accommodation that

will impose an undue hardship on the operation of the employer's or other covered entity's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision is sensitive to the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. The fact that that particular accommodation poses an undue hardship, however, only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.

An employer's claim that the cost of a particular accommodation will impose an undue hardship will be analyzed in light of the factors outlined in the regulations. In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In many cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular site that will actually be required to provide the accommodation. See House Labor Report at 68-69; House Judiciary Report at 40-41; see also Conference Report at 58-57.

If the employer or other covered entity asserts that only the financial resources of the site where the individual will be employed should be considered, the regulations require a factual determination of the relationship between the employer or other covered entity and the site that will provide the accommodation. As an example, suppose that an independently owned fast food franchise that receives no money from the franchisor refuses to hire an individual with a hearing impairment because it asserts that it would be an undue hardship to provide an interpreter to enable the individual to participate in monthly staff meetings. Since the financial relationship between the

franchisor and the franchise is limited to payment of an annual franchise fee, only the financial resources of the franchise would be considered in determining whether or not providing the accommodation would be an undue hardship. See House Labor Report at 68; House Judiciary Report at 40.

If the employer or other covered entity can show that the cost of the accommodation would impose an undue hardship, it will still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deductions or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives or is eligible to receive monies from an external source that would pay the entire cost of the accommodation, it cannot claim cost as an undue hardship. To the extent that such monies pay or would pay for only part of the cost of the accommodation, only that portion of the cost of the accommodation that could be recovered—the final net cost to the entity—may be considered in determining undue hardship.

The individual with a disability requesting the accommodation must also be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business. As with outside funding available to enable the employer or other covered entity to provide the reasonable accommodation, only the net cost of the accommodation to the employer or other covered entity is to be included in the calculation of undue hardship. (See § 1630.9 Not Making a Reasonable Accommodation). See Senate Report at 36; House Labor Report at 69.

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the

employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the three factors listed in the regulations:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm; and
- (3) The likelihood that the potential harm will occur.

Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983).

An employer is also permitted to require that an individual with a disability not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer would reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual with a disability must be strictly based on valid medical analyses or on other objective evidence. This determination must be based on individualized factual data rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 58; House Labor at 73-74; House Judiciary Report at 45. See also *Mantolite v. Bolger*, 787 F.2d 1416 (9th Cir. 1985); *Bentivegna v. U.S. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

Section 1630.3 Exceptions to the Definitions of "Disability" and "Qualified Individual with a Disability"

Section 1630.3 (a)-(c) Illegal Use of Drugs

The regulations provide that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs such as cocaine and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear or being held liable for discrimination. The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms "disability" and "qualified individual with a disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term "rehabilitation program" refers to both in-patient and out-patient programs, as well as to appropriate employee assistance or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

An individual cannot demonstrate that he or she is no longer engaging in the illegal use of drugs by simply showing participation in a drug treatment program. It is essential that the individual offer evidence, such as drug test results, to prove that he or she is not currently engaging in the illegal use of drugs. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See § 1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

Section 1630.4 Discrimination Prohibited

This provision prohibits discrimination against a qualified individual with a disability in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.

These regulations are not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of § 1630.4. Covered

entities are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.

Thus, for example, it would be a violation of these regulations for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of these regulations for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are uninterested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges. It would also be a violation of these regulations to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that these regulations are intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. These regulations do not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of these regulations.

So, for example, it would be permissible for an employer to offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number

of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28-29; House Labor Report at 58-59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate these regulations simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of these regulations, even if the benefits reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of these regulations. See *Alexander v. Choate*, 469 U.S. 287 (1985); See Senate Report at 85; House Labor Report at 127. (See also, the discussion at Section 1630.18(f) Health Insurance, Life Insurance, and Other Benefit Plans).

Section 1630.6 Contractual or Other Arrangements

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

The regulation notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. Thus a copier company would be required to ensure the provision of any reasonable accommodation necessary to enable its copier service representative with a disability to service a client's machine.

The existence of the contractual relationship adds no new obligations, beyond those already imposed by these regulations. The employer, therefore, is not liable through the contractual arrangement for any discrimination by the contractor against the contractor's own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by these regulations by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable

accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 59; House Labor Report at 59-61; House Judiciary Report at 36-37.

To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under these circumstances, appropriate accommodations might include (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under Title III of the ADA). However, this would not relieve the employer of its responsibility under these regulations nor shield it from charges of discrimination by its own employees. See House Labor Report at 40; House Judiciary Report at 37.

Section 1630.8 Relationship or Association with an Individual with a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to

the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with AIDS patients, and the employer fears that the employee may contract the disease.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with a disability. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61-62; House Judiciary Report at 38-39. Section 1630.9 Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of nondiscrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of a qualified individual with a

disability as a reasonable accommodation. However, an employer would not be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, such as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this Part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that he or she needs a reasonable accommodation to be able to perform the job's essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not "otherwise qualified" for the position.

On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be "otherwise qualified." The law firm would thus be required to provide a reasonable accommodation, such as a reader, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33-34; House Labor Report at 64-65.

The reasonable accommodation that is required by this regulation should provide the

qualified individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the-art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. *See* Senate Report at 35; House Labor Report at 68; *see also* *Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations of a qualified individual with a disability that are known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. *See* Senate Report at 34; House Labor Report at 65.

Process of Determining the Appropriate Reasonable Accommodation

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The process of determining the appropriate reasonable accommodation is an informal, interactive, problem solving technique involving both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. *See* Senate Report at 34-35; House Labor Report at 65-67.

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's

disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and of the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then

the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from state or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that the failure to obtain or receive technical assistance will not excuse the employer from its reasonable accommodation obligation.

Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a sack handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation. Upon receiving the request, the employer analyzes the sack handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual's specific disability to the performance of the job's essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration

of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and so be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b)

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d)

The purpose of this provision is to clarify that an employer or other covered entity may not compel a qualified individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71-72.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with disabilities or a class of individuals with disabilities may not be used unless the employer demonstrates that that criteria, as used by the employer, are job-related to the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities but do not concern an essential function of the job would not be consistent with business necessity.

It is possible for the use of selection criteria that concern an essential function to be

consistent with business necessity. However, selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation, including the adoption of an alternative, less discriminatory criterion. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under these regulations will generally be resolved in a like manner.

This provision is applicable to all types of selection criteria, including requirements that an employee not pose a direct threat to self or others, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See Senate Report at 37-39; House Labor Report at 70-72; House Judiciary Report at 42. As previously noted, however, it is not the intent of these regulations to second guess an employer's business judgment with regard to production standards. (See § 1630.2(n) Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UCESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to these regulations.

Section 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is prerequisite to the job. Read together with the reasonable accommodation requirement of § 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is only required to provide such reasonable accommodation if it knows that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual that the employer knows is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. An employer may also be

required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. See Senate Report at 37-38; House Labor Report at 70-72; House Judiciary Report at 42; see also *Stutts v. Freeman*, 894 F.2d 686 (11th Cir. 1983); *Crane v. Dole*, 817 F. Supp. 158 (D.D.C. 1985).

The provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is essential to the effective performance of the job. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employer's, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 38; House Labor Report at 75; House Judiciary Report at 44.

This provision does not prohibit employers from making inquiries or requiring medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. Nor does this provision prohibit periodic physicals to determine fitness for duty if such physicals are required by medical standards or requirements established by Federal, state, or local law that are consistent with the ADA (or in the case of a federal standard, with section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity. Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74-75.

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate that job function and inquire whether or not the applicant can perform that function with or without accommodation.

For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

On the other hand, however, an employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. Nor may an employer ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in the regulations are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including relevant physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's relevant physical and psychological criteria for the job will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with disabilities or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59-60; Senate Report at 39; House Labor Report at 73-74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating these regulations.

The information obtained in the course of a permitted entrance examination is to be treated as a confidential medical record and may only be used for the limited purposes specified in the regulation at § 1630.14(b) (2) and (3).

Section 1630.14(c) Other Acceptable Examinations and Inquiries

The regulations permit voluntary medical examinations, including voluntary medical histories, as part of the employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this regulation and must not be used for any purpose in violation of these regulations, such as limiting health insurance

eligibility. House Labor Report at 75; House Judiciary Report at 43-44.

Section 1630.15 Defenses

The section on defenses in the regulation is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under Title VII, as expressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and their progeny, is applicable to charges of disparate treatment brought under the ADA. See *Prewitt v. U.S. Postal Service*, 682 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to Title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability.

Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications. The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The defense is rebutted if the alleged legitimate nondiscriminatory reason is shown to be pretextual.

Section 1630.15 (b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.*, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if there is a less discriminatory alternative criterion that meets the legitimate needs of the business, or if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires as part of its application process an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (*e.g.*, no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at § 1630.5 Limiting, Segregating and Classifying, and § 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense to Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make reasonable accommodation, as required by this regulation, may offer as a defense that it would have been an undue hardship to make the required accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in § 1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case-by-case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in these regulations is unlike the "undue hardship" defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA, an employer must show substantially more difficulty or expense than would be needed to satisfy the "de minimis" title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68-69; House Judiciary Report at 40-41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. Accordingly, by way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business' thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation. It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees was the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation.

Section 1630.15(e) Defense—Conflicting Federal Laws and Regulations

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or

regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a less discriminatory means to comply with the statute that would not conflict with these regulations. See House Labor Report at 74.

Section 1630.16 Specific Activities Permitted

Section 1630.16(a) Religious Entities

Religious organizations are not exempt from Title I of the ADA. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 42; House Labor Report at 76-77; House Judiciary Report at 46.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds other employees. Individuals disabled by alcoholism are otherwise entitled to the same protections accorded other individuals with disabilities under these regulations. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of these regulations when the employer acts on the basis of such use.

Section 1630.16(c) Drug Testing

This provision reflects Title I's neutrality toward drug testing. Drug tests are neither encouraged nor prohibited. The results of drug tests may be used as a basis for disciplinary action. Drug tests are not considered medical examinations for purposes of these regulations. If the results reveal information about an individual's medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to

be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

Section 1630.16(e) Infectious and Communicable Diseases; Food Handling Jobs

This provision addressing food handling jobs applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61-63. (See § 1630.2(r) Direct Threat).

Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to state laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate these regulations even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of these regulations. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. This regulation requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84-86; House Labor Report at 136-138; House Judiciary Report at 70-71. See the discussion of § 1630.5 Limiting, Segregating and Classifying.

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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 35

[Order No. 1474-91]

Nondiscrimination on the Basis of Disability in State and Local Government Services

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements subtitle A of title II of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by public entities. Subtitle A extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance. This proposed rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications. It also sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of disability and qualified individual with a disability, and establishes a complaint mechanism for resolving allegations of discrimination.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 29, 1991. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, DC 20013.

Comments received will be available for public inspection in Room 854 of the HOLC Building, 320 First Street, NW., Washington, DC, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from March 14, 1991, until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers.

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, Braille, electronic file on computer disk,

and audio-tape. Copies may be obtained from the Office on the Americans with Disabilities Act at (202) 514-0301 (Voice) or (202) 514-0381 (TDD). The notice of proposed rulemaking is also available on electronic bulletin board at (202) 514-6193.

FOR FURTHER INFORMATION CONTACT:

John Wodatch, Office on the Americans with Disabilities Act, or Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530. These individuals may be contacted through the Division's ADA Information Line at (202) 514-0301 (Voice), (202) 514-0381 (TDD), or (202) 514-0383 (TDD). These telephone numbers are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The landmark Americans with Disabilities Act ("ADA" or "the Act"), enacted on July 26, 1990, provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications.

The Department of Justice has published separately its proposed regulation for implementation of title III of the ADA, which applies to public accommodations and commercial facilities. (56 FR 7452, February 22, 1991.)

This proposed regulation implements title II of the ADA, which applies to State and local governments. Most programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Because title II of the ADA is, in essence, an extension of the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance, this proposed rule hews as closely as possible to the provisions of existing section 504 regulations. This approach is also based on section 204 of the ADA, which provides that the regulations issued by the Attorney General to implement title II shall be consistent with the ADA and with the Department of Health, Education, and Welfare's coordination regulation, now codified at 28 CFR part 41, and, with respect to program accessibility and communications, with the Department of Justice's regulation for its federally conducted programs and activities, codified at 28 CFR part 39.

The first regulation implementing section 504 was issued in 1977 by the Department of Health, Education, and Welfare (HEW) for the programs and activities to which it provided Federal financial assistance. The following year, pursuant to Executive Order 11914, HEW issued its coordination regulation for federally assisted programs, which served as the model for regulations issued by the other Federal agencies that administer grant programs. HEW's coordination authority, and the coordination regulation issued under that authority, were transferred to the Department of Justice by Executive Order 12250 in 1980.

In 1978, Congress extended application of section 504 to programs and activities conducted by Federal Executive agencies and the United States Postal Service. Pursuant to Executive Order 12250, the Department of Justice developed a prototype regulation to implement the 1978 amendment for federally conducted programs and activities. More than 80 Federal agencies have now issued final regulations based on that prototype, prohibiting discrimination based on handicap in the programs and activities they conduct.

Despite the large number of regulations implementing section 504 for federally assisted and federally conducted programs and activities, there is very little variation in their substantive requirements, or even in their language. Major portions of this proposed regulation, therefore, are taken directly from the existing regulations. The sections on communications and program accessibility are based on the regulations for federally conducted programs, which provide specific guidance on the requirements applicable to communications and explain that the statute does not require any action that the entity can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens.

The proposed rule is organized into seven subparts. Subpart A, "General," includes the purpose and application sections, describes the relationship of the Act to other laws, and defines key terms used in the regulation. It also includes administrative requirements, adapted from the section 504 regulations, for self-evaluations, notices, designation of responsible employees, and adoption of grievance procedures by public entities.

Subpart B, "General Requirements," contains the general prohibitions of discrimination based on the section 504

regulations. It also contains certain "miscellaneous" provisions derived from title V of the Act that involve issues such as retaliation and coercion against those asserting ADA rights, illegal use of drugs, and restrictions on smoking. These provisions are also included in the Department's proposed title III regulation, as is the general provision on maintenance of accessible features.

Subpart C addresses employment by public entities, which is also covered by title I of the Act. The Department proposes to adopt, as compliance standards for employment under title II, the definitions and requirements that will be established by the Equal Employment Opportunity Commission (EEOC) for title I.

Subpart D, which is also based on the section 504 regulations, sets out the requirements for program accessibility in existing facilities and in new construction and alterations.

Subpart E contains specific requirements relating to communications.

Subpart F establishes administrative procedures for enforcement of title II. As provided by section 203 of the Act, these are based on the procedures for enforcement of section 504, which, in turn, are based on the enforcement procedures for title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d-4a). Subpart F also restates the provisions of title V of the ADA on attorneys fees, alternative means of dispute resolution, the effect of unavailability of technical assistance, and State immunity.

Subpart G designates the Federal agencies responsible for investigation of complaints under this part. It assigns enforcement responsibility for particular public entities, on the basis of their major functions, to nine Federal agencies that currently have substantial responsibilities for enforcing section 504. The Department of Justice would have enforcement responsibility for all State and local government entities not assigned to other designated agencies. The part would not, however, displace the existing enforcement authorities of the Federal funding agencies under section 504.

Section-by-Section Analysis

Subpart A—General

Section 35.101 Purpose.

Section 35.101 states the purpose of the proposed rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to

matters within the scope of the authority of the Secretary of Transportation under the Act.

Section 35.102 Application

Except as provided in paragraph (b) of this section, the proposed regulation applies to all services, programs or activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or instrumentalities or agencies thereof, regardless of the receipt of Federal financial assistance. The scope of Title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

Paragraph (b) of § 35.102 explains that public transportation services, programs, and activities of public entities covered by subtitle B of title II of the Act are subject to regulations issued by the Department of Transportation at 49 CFR part 37. The specific provisions in the Department of Transportation's regulation, including the limitations on those provisions, control over the general provisions of this part in circumstances where both specific and general provisions apply. Resort to the general provisions of this part is only appropriate where there are no applicable specific rules of guidance in the Department of Transportation's regulation. For example, services, programs, and activities that are covered by the Department of

Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by § 35.105.

Section 35.103 Relationship to Other Laws

Section 35.103 restates the requirements of section 501(b) of the ADA. It makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the proposed regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State that does not confer greater substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but not on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

Because the ADA itself allows exclusion of clients and customers who pose a direct threat to the health or safety of others, a State public health law that guards against such threats, but that does not discriminate against people with disabilities, would be a law providing protection equal to that provided by the ADA and hence would not be preempted by the ADA.

Section 35.104 Definitions

Act. The word "Act" is used in this part to refer to the Americans with Disabilities Act of 1990, Public Law 101-

336, which is also referred to as the "ADA."

Assistant Attorney General. The term "Assistant Attorney General" refers to the Assistant Attorney General of the Civil Rights Division of the Department of Justice.

Auxiliary aids and services. Auxiliary aids and services include a wide range of services and devices. The definition in § 35.104 provides a list of examples of auxiliary aids and services that is taken from the definition of auxiliary aids and services in section 3(l) of the ADA and supplemented by examples from regulations implementing section 504 in federally conducted programs (see, 28 CFR 39.103).

Complete complaint. "Complete complaint" is defined to include all the information necessary to enable the Federal agency designated under subpart G as responsible for investigation of a complaint to initiate its investigation.

Current illegal use of drugs. The phrase "current illegal use of drugs" is used in § 35.131. Its meaning is discussed in the preamble for that section.

Designated agency. The term "designated agency" is used to refer to the Federal agency designated under subpart G of this proposed rule as responsible for carrying out the administrative enforcement responsibilities established by subpart F of the proposed rule.

Disability. The definition of the term "disability" is the same as the definition in the proposed title III regulation. It is comparable to the definition of the term "individual with handicaps" in section 7(8) of the Rehabilitation Act of 1973 and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare (HEW) in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulations implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 50 (1990) (hereinafter "Education and Labor report").

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Congress to make use of up-to-date, currently accepted terminology. As with racial and ethnic epithets, the choice of terms to apply to

a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "disability" means, with respect to an individual—

- (A) A permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment. If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test A—A physical or mental impairment that substantially limits one or more of the major life activities of such individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i)(A) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any

mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This is the list used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. However, the list of examples in paragraph (1) (ii) of the definition includes: Orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction, and alcoholism.

The list of examples of "physical or mental impairments" in paragraph (1)(ii) is the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease" and "tuberculosis" to the list of examples. These additions are based on the committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment which may substantially limit a major life activity either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of

the Senate Comm. on Labor and Human Resources, 101st. Cong., 1st Sess. 346 (1989).

Paragraph (1)(iii) states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

An impairment is not necessarily excluded from the definition of "disability" simply because it is temporary. The duration, or expected duration, of an impairment is, however, one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. Temporary impairments,

such as a broken leg, are not commonly regarded as disabilities, but in rare circumstances the degree of the limitation and its expected duration may be substantial. Similarly, obesity rarely results in a substantial limitation on a major life activity. It must be emphasized that each case involving a determination of substantial limitation must be evaluated on its own merits.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Test B—A record of such an impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the proposed rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C—Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often face discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline*, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

Thus, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the

person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either section 504 or the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Act Amendments of 1988, Pub. L. 100-430, section 6(b).)

Drug. The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

Facility. "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Senate and House committee reports made clear that the definition of facility was drawn from the definition of facility in the current Federal regulations implementing section 504 of the Rehabilitation Act. Education and Labor report at 114. It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

Illegal use of drugs. The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies

that the term includes the illegal use of one or more drugs.

Individual with a disability means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public entity acts on the basis of such use. The phrase "current illegal use of drugs" is explained in § 35.131.

Public entity. The term "public entity" is defined in accordance with section 201(l) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; or the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability. The definition of "qualified individual with a disability" is taken from section 201(2) of the Act, which is derived from the definition of "qualified handicapped person" in the Department of Health and Human Services' regulation implementing section 504 (45 CFR § 84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment ("a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question") with the definition for other services at 45 CFR 84.3(k)(4) ("a handicapped person who meets the essential eligibility requirements for the receipt of such services"), with specific references to the requirements of title II.

State. The definition of "State" is identical to the statutory definition in section 3(3) of the ADA.

Section 35.105 Self-evaluation

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part. Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA. Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an

existing regulation implementing section 504.

Section 35.106 Notice

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Section 35.107(a) requires public entities with 50 or more employees to designate at least one employee responsible for coordination of its efforts to carry out its responsibilities under this part. The requirement for designation of a responsible employee is derived from the HEW regulation implementing section 504 in federally assisted programs [45 CFR 84.7(a)]. The requirement for designation of a particular employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The proposed rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the

complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under § 35.170(b).

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the proposed rule are based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in § 35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with disabilities with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph

(b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with disabilities still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, and paragraph (e), which is based on section 501(d) of the Act, provides that a public entity may not require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegate persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

These provisions should not be construed to jeopardize in any way the

continued viability of separate schools providing special education for particular categories of children with disabilities, sheltered workshops, special recreational programs, and other similar programs.

At the same time, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in § 35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 35.104).

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the

operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. H.R. Rep. No. 485, 101st Cong., 2d Sess., part 3, at 52 (1990) (hereinafter "Judiciary report").

For example, a parking facility operated by a public entity may be required to modify a rule barring all vans with raised roofs (including those that are wheelchair accessible), if a wheelchair-user operating such a van wishes to park in the facility and overhead structures are, in fact, high enough to accommodate the height of the van.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been

revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between *illegal* use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Alcohol is not a controlled substance, so use of alcohol is not affected by § 35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute). Section 35.131 also does not affect use of controlled substances pursuant to a valid prescription, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It is the *use* of the substance, rather than the substance itself, that is illegal.

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are

individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in § 35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 598, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat a individual's burns on the grounds that the individual is illegally using drugs.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the

provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 35.131(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs."

Section 35.132 Smoking

Section 35.132 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II.

Section 35.133 Maintenance of Accessible Features

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked automatic doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Therefore, it is not intended that isolated instances of mechanical failure be considered violations of the Act or this part. However, repeated mechanical failures due to improper or inadequate maintenance would violate this part. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Section 35.134 Retaliation or coercion

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any person who exercises his or her rights under the Act. Paragraph (a) provides that no private or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by the Act or this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

Subpart C—Employment

Section 35.140 Employment discrimination prohibited

Title II of the ADA applies to all activities of public entities, including their employment practices. In its report on title II of the ADA, the House Education and Labor Committee stated that title II "essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments," and that "the forms of discrimination prohibited by section 202 (are) identical to those set out in the applicable provisions of titles I and III of this legislation." Education and Labor report at 84. Section 504's broad coverage of employment practices is well-established. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

Section 204(b) of the Act requires that regulations issued to implement title II be consistent not only with specified section 504 regulations but with the Act itself. In title I of the ADA, Congress

carefully considered the remedial scheme that it wished to create for attacking discrimination in employment. In order to give effect to these provisions, § 35.140 of the proposed rule provides that the definitions, requirements, and procedures of title I of the Act, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to complaints of employment discrimination against public entities.

This incorporation of title I standards includes the title I definition of "employer." Under that definition, a public entity with 25 or more employees will only become subject to the ADA's employment provisions on July 26, 1992, and those with 15-24 employees on July 26, 1994. Public entities with fewer than 15 employees will not be subject to the ADA's employment requirements.

Section 35.140 does not affect a public entity's coverage under section 504 with respect to programs or activities receiving Federal financial assistance.

Subpart D—Program Accessibility

Section 35.149 Discrimination Prohibited

Section 35.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 35.150 and 35.151.

Section 35.150 Existing Facilities

Consistent with section 204(b) of the Act, this proposed regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR part 39). Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§ 35.150(a)(1)).

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and

administrative burdens. A similar limitation is provided in § 35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with § 35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of § 35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity. The decision that compliance would result in such alteration or burdens must be made by the public entity head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the public entity head's decision or failure to make a decision may file a complaint under the compliance procedures established in subpart F.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural

member.) The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

The legislative history of title II of the ADA makes it clear that, under title II, "local and state governments are required to provide curb cuts on public streets." Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, "The employment, transportation, and public accommodation sections of . . . (the ADA) would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." *Id.* Section 35.151, which establishes accessibility requirements for new construction and alterations, will apply to any curbing on a public street, road or highway that is to be constructed or altered by a public entity, and would require the entity to install ramps at any intersection having curbs or other barriers to entry onto the street or road from a sidewalk. The general requirement for program accessibility would apply to the provision of curb cuts at existing crosswalks. Similarly, a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

Historic preservation programs. Paragraph (a)(2) of § 35.151 provides a special limitation on the obligation to ensure program accessibility that is applicable only to historic preservation programs. In order to avoid possible conflict between the congressional mandates to preserve historic properties, on the one hand, and to eliminate discrimination against individuals with disabilities on the other, paragraph (a)(2) provides that, in historic preservation programs, the public entity is not required to take any action that would result in a substantial impairment of significant historic features of an historic property.

Nevertheless, because the primary benefit of an historic preservation program is uniquely the experience of the historic property itself, paragraph (b)(2) requires the public entity to give priority to methods of providing program accessibility that permit individuals with disabilities to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the public entity administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities (§ 35.130(d)). Only when

providing physical access would result in a substantial impairment of significant historic features, a fundamental alteration in the nature of the program, or in undue financial and administrative burdens, may the public entity adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in paragraph (b)(2).

The special limitation on program accessibility set forth in paragraph (a)(2) is applicable only to programs that have preservation of historic properties as a primary purpose. Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program the public entity is not bound to a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might impair significant historic features of the historic property.

Time periods. Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. Like the regulations for federally assisted programs (e.g., 28 CFR 41.57(b)), paragraph (c) requires the public entity to make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

Where structural modifications are required, paragraph (d) requires that a transition plan be developed by an entity that employs 50 or more persons, within six months of the effective date of this regulation. Paragraph (d)(3) provides that, if a public entity has already completed a transition plan required by a regulation implementing section 504, the transition plan required by this part will apply only to those policies and practices that were not covered by the previous transition plan.

Aside from structural changes, all other necessary steps to achieve compliance with this part shall be taken within sixty days. Of course, this section does not reduce or eliminate any obligations that are already applicable to a public entity under section 504.

Section 35.151 New Construction and Alterations

Section 35.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity, after the effective date of this part, shall be designed, constructed, or altered to be readily accessible to

and usable by individuals with disabilities. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) shall be deemed to comply with the requirements of this section with respect to those facilities. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

The Department proposes to adopt UFAS as the interim accessibility standard under this rule because it is the standard now referenced by the regulations implementing section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to the State and local government entities subject to this rule. However, it should be noted that section 504 of the ADA requires the Architectural and Transportation Barriers Compliance Board (Board) to issue supplemental Minimum Guidelines and Requirements for Accessible Design of buildings and facilities subject to the Act. Section 204(c) of the ADA provides that the Attorney General shall promulgate regulations implementing title II that are consistent with the Board's ADA guidelines. The Department anticipates that after the Board's title II guidelines have been published, this rule will be amended to adopt those guidelines as the accessibility standards.

Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 35.151.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the same program accessibility standard should apply to both owned and leased existing buildings.

On the other hand, the more accessible the leased space is, the fewer structural modifications will be required in the future for particular employees whose disabilities may necessitate

barrier removal as a reasonable accommodation. Pursuant to the requirements for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published under the Architectural Barriers Act by the Architectural and Transportation Barriers Compliance Board, 38 CFR 1190.34, the Federal Government may not lease a building unless it contains (1) one accessible route from an accessible entrance to those areas in which the principal activities for which the building is leased are conducted, (2) accessible toilet facilities, and (3) accessible parking facilities, if a parking area is included within the lease (38 CFR 1190.34). Although these requirements are not applicable to buildings leased by public entities covered by this regulation, such entities are encouraged to look for the most accessible space available to lease and to attempt to find space complying at least with these minimum Federal requirements.

Section 35.151(d) gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize that the national interest in preserving significant historic structures warrants deference to statutory restrictions placed on alterations to historic facilities by Federal, State, and local statutes. Therefore, paragraph (d)(1) of § 35.151 provides that in making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities, but paragraph (d)(2) provides that if it is not possible to provide physical access to an historic property without substantially impairing the historic features of the facility, then alternative methods of accessibility shall be provided pursuant to the requirements of § 35.150.

Subpart E—Communications

Section 35.160 General

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b) requires the public entity to furnish appropriate auxiliary aids when necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public

entity must provide an opportunity for individuals with disabilities to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the public entity (§ 35.160(b)(1)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164.

Section 35.160 (b)(2) provides that the public entity need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature. For example, the public entity need not provide eyeglasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the public entity to provide wheelchairs to persons with mobility impairments.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate.

Section 35.161 Telecommunication Devices for the Deaf (TDD's)

Section 35.161 requires that, where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems be used to communicate with individuals with impaired speech or hearing.

Many persons with impaired speech or hearing are unable to communicate effectively using telephone voice transmissions. Title IV of the ADA addresses this problem by requiring establishment of telecommunications relay services to permit individuals using Telecommunication Devices for the Deaf (TDD's) to communicate with people using voice telephones. A TDD is a device that converts letters typed on a keyboard into tones that are transmitted over standard telephone circuits to another TDD at the receiving end which, in turn, converts them back to letters that are printed or displayed on a screen. When both the caller and the person being called have compatible TDD's, they are able to communicate directly without any voice transmission. Problems arise when an individual who does not have a TDD needs to communicate with an individual who

uses a TDD. The relay services required by title IV would involve a relay operator using both a voice telephone and a TDD to type the voice messages to the TDD user and speak the TDD messages to the voice user.

Section 204(b) of the ADA requires that the regulation implementing title II with respect to communications be consistent with the Department of Justice's regulation implementing section 504 for its federally conducted programs and activities at 28 CFR part 39. Section 35.161 is taken from paragraph (a)(2) of § 39.160 of the Justice federally conducted regulation, which requires use of TDD's or equally effective telecommunication systems for communication with people who are unable to use the Department's voice telephone system. Of course, where relay services, such as those required by title IV of the ADA are available, a public entity may use those services to meet the requirements of this section.

Section 35.162 Telephone Emergency Services

Many public entities provide telephone emergency services by which individual's can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including "911" services—are clearly a vital public service whose reliability can be a matter of life or death. The legislative history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunications technology. Conference report at 67-68; Education and Labor report at 84-85.

Telecommunications technology makes it feasible for public entities to provide direct access to telephone emergency systems for persons with speech or hearing impairments who use telecommunications devices for the deaf (TDD's). TDD's use either the Baudot format or the American Standard Code for Information Interchange (ASCII) format to make telephone calls. Computer modems generally use the ASCII format. The House and Senate conferees intended that, to be accessible, telephone emergency services must be able to use both Baudot and ASCII codes for telecommunications. Conference report at 68.

Section 35.162 mandates that public entities that provide emergency telephone services provide services to persons with disabilities that are functionally equivalent to the services

provided to others. The section is drafted to reflect the congressional intent embodied in the legislative history of the ADA. Public entities must equip their telephone emergency services with technology that provides persons with disabilities with services that are "functionally equivalent" to voice services offered to non-disabled persons. See 136 Cong. Rec. H2431 (daily ed. May 17, 1990) (statement of Rep. Gunderson).

The requirement for accessible telephone emergency services should not have the effect of freezing technology or thwarting the introduction of superior or more efficient technology. Telecommunications technology to be required refers not only to "installation of a TDD or compatible ASCII or Baudot computer modems by programs operating these services," but also to "future technological advances—such as speech to text services." Education and Labor report at 85.

Section 35.163 Information and Signage

Section 35.163 requires the public entity to provide information to individuals with disabilities concerning accessible services, activities, and facilities. Paragraph (b) requires the public entity to provide signage at all inaccessible entrances to each of its facilities that directs users to an accessible entrance or to a location with information about accessible facilities.

Section 35.164 Duties

Section 35.164, like paragraph (a)(3) of § 35.150, is taken from the section 504 regulations for federally conducted programs. Like paragraph (a)(3), it limits the obligation of the public entity to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it. It also includes specific requirements for determining the existence of undue financial and administrative burdens. The preamble discussion of § 35.150(a) regarding that determination also applies to this section and should be referred to for a complete understanding of the public entity's obligation to comply with §§ 35.160–35.164. Because of the essential nature of the services provided by telephone emergency systems, the Department anticipates that § 35.164 will rarely be applied to § 35.162.

Subpart F—Compliance Procedures

Subpart F sets out the procedures for administrative enforcement of this part. Section 203 of the Act provides that the remedies, procedures, and rights set

forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) for enforcement of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement of title II. Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d–4a). Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, is administratively enforced by the Federal agencies that provide the Federal financial assistance to the covered programs and activities in question, and the primary enforcement sanction is the termination of Federal funds to a program that is found to discriminate.

Title II of the ADA extended the requirements of section 504 to all services, programs, and activities of State and local governments, not only those that receive Federal financial assistance. The House Committee on Education and Labor explained the enforcement provisions as follows:

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, . . . the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action. Education & Labor report at 98. See also Senate report at 57–58.

Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that is, where

a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance. Because the Civil Rights Restoration Act (Pub. L. 100-259) extended the application of section 504 to all of the operations of the public entity receiving the Federal financial assistance, many activities of State and local governments are already covered by section 504. The procedures in subpart F apply to complaints concerning services, programs, and activities of public entities that are covered by the ADA.

Subpart G designates the Federal agencies responsible for enforcing the ADA with respect to specific components of State and local government. It does not, however, displace existing jurisdiction under section 504 of the various funding agencies. Individuals may still file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. Subpart F establishes the procedures to be followed by the agencies designated in subpart G for processing complaints against State and local government entities that do not receive Federal funds.

Section 35.170 Complaints

Section 35.170 provides that any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part within 180 days of the date of the alleged discrimination, unless the time for filing is extended by the agency for good cause. Filing the complaint with any Federal agency will satisfy the requirement for timely filing. As explained below, a complaint filed with an agency that has jurisdiction under section 504 will be processed under the agency's procedures for enforcing section 504.

Section 35.171 Acceptance of Complaints

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The Department is proposing to provide complainants an

opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated under subpart G as responsible for that public entity, the agency must refer the complaint to the appropriate designated agency.

Whenever the appropriate designated agency receives a complaint, it will process the complaint under section 504, if it has jurisdiction under section 504, or, if it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart. Section 35.171 also contains procedures for coordinating the processing of employment complaints with the EEOC.

Section 35.172 Resolution of Complaints

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the recipient a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Thus, as explained in paragraph (b) of § 35.172, the complainant may elect to pursue a private suit if the designated agency does not find a violation. If the agency does find a violation, the complainant may still file a private suit, or the procedures in §§ 35.173 and 35.174 shall be followed. The complainant may also elect to proceed with a private suit at any time, because the Act provides a private right of action and does not require exhaustion of administrative remedies.

Section 35.173 Voluntary Compliance Agreements

Section 35.173 requires the agency to attempt to resolve all complaints in which it finds noncompliance through voluntary compliance agreements enforceable by the Attorney General.

Section 35.174 Referral

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to obtain voluntary compliance.

Section 35.175 Attorney's Fees

Section 35.175 states that courts are authorized to award attorney's fees, as provided in section 505 of the Act.

Section 35.176 Alternative Means of Dispute Resolution

Section 35.176 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

Section 35.177 Effect of Unavailability of Technical Assistance

Section 35.177 explains that, as provided in section 506(e) of the Act, a public entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

Section 35.178 State Immunity

Section 35.178 restates the provision of section 502 of the Act that a State is not immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court for violations of the Act, and that the same remedies are available for any such violations as are available in an action against an entity other than a State.

Subpart G—Designated Agencies

Section 35.190 Designated Agencies

Subpart G designates the Federal agencies responsible for investigating complaints under this part. At least 26 agencies currently administer programs of Federal financial assistance that are subject to the nondiscrimination requirements of section 504 as well as other civil rights statutes. A majority of these agencies administer modest programs of Federal financial assistance and/or devote minimal resources exclusively to "external" civil rights enforcement activities. Under Executive Order 12250, the Department of Justice has encouraged the use of delegation agreements under which certain civil rights compliance responsibilities for a class of recipients funded by more than one agency are delegated by an agency or agencies to a "lead" agency. For example, many agencies that fund institutions of higher education have signed agreements that designate the Department of Education as the "lead" agency for this class of recipients.

The use of delegation agreements reduces overlap and duplication of effort, and thereby strengthens overall civil rights enforcement. However, the use of these agreements to date generally has been limited to education and health care recipients. These classes of recipients are funded by numerous agencies and the logical

connection to a lead agency is clear (e.g., the Department of Education for colleges and universities, and the Department of Health and Human Services for hospitals).

The ADA's expanded coverage of State and local government operations further complicates the process of establishing Federal agency jurisdiction for the purpose of investigating complaints of discrimination on the basis of disability. Because all operations of public entities now are covered, irrespective of the presence or absence of Federal financial assistance, many additional State and local government functions and organizations now are subject to Federal jurisdiction. In some cases, there is no historical or single clear-cut subject matter relationship with a Federal agency as was the case in the education example described above. Further, the 33,000 governmental jurisdictions subject to the ADA differ greatly in their organization, making a detailed and workable division of Federal agency jurisdiction by individual State, county, or municipal entity unrealistic.

The Department of Justice proposes to apply the delegation concept to the investigation of complaints of discrimination on the basis of disability by public entities under the ADA. The Department of Justice proposes to designate nine agencies, rather than all agencies currently administering programs of Federal financial assistance, as responsible for investigating complaints under this part. These "designated agencies" generally have the largest civil rights compliance staffs, the most experience in complaint investigations and disability issues, and broad yet clear subject area responsibilities. The proposed division of responsibilities is made functionally rather than by public entity type or name designation. For example, under this proposal all entities (regardless of their title) that exercise responsibilities, regulate, or administer services or programs relating to lands and natural resources would fall within the jurisdiction of the Department of Interior.

It is anticipated that complaints under this part will be investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. For example, a complaint against a State real estate commission or a local housing code enforcement division, where such a commission or division is a recognizable entity, would be investigated by the Department of Housing and Urban Development (the designated agency for

real estate industry and housing code enforcement functions), even though both entities were part of a general umbrella department of planning and regulation (for which the Department of Justice is the designated agency). If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

This proposal also assigns the Department of Justice as the designated agency responsible for all State and local government functions not assigned to other designated agencies. The Department of Justice, under an agreement with the Department of the Treasury, continues to receive and coordinate the investigation of complaints filed under the Revenue Sharing Act. This entitlement program, which was terminated in 1986, provided civil rights compliance jurisdiction for a wide variety of complaints regarding the use of Federal funds to support various general activities of local governments. In the absence of any similar program of Federal financial assistance administered by another Federal agency, placement of designated agency responsibilities for miscellaneous and otherwise undesignated functions with the Department of Justice is proposed as an appropriate continuation of current practice.

The Department of Justice seeks comments on the proposed listing of designated agencies and their areas of responsibility. Suggestions and alternatives are welcomed to improve the proposed complaint investigation procedures.

Regulatory Process Matters

This notice of proposed rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12291. The Department has determined that it is not a major rule for purposes of that executive order. The Department has nonetheless prepared a preliminary regulatory impact analysis (RIA) of this rule and will provide copies of this document to the public on request. The Department encourages comment on this RIA as well as the submission of any data that would assist the Department in estimating the costs and benefits of the proposed rule.

The Department has determined that this proposed rule will not have a significant economic impact on a substantial number of small business entities. Therefore, it is not subject to the Regulatory Flexibility Act.

The Department is preparing a statement of the federalism impact of the proposed rule under Executive Order 12612 and will provide copies of this statement on request.

The reporting and recordkeeping requirements described in the proposed rule are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320. Accordingly, those proposed information collection requirements are being submitted to OMB for review pursuant to the Paperwork Reduction Act. Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. Attention: Desk Officer for the Department of Justice. The Department requests that comments sent to OMB also be sent to the rulemaking docket for this proposed action, at the address given in the "ADDRESSES" section of this notice.

List of Subjects in 28 CFR Part 35

Administrative practice and procedure, Alcoholism, Americans with disabilities, Buildings, Civil rights, Drug abuse, Handicapped, Historic preservation, Intergovernmental relations, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by 28 U.S.C. 509, 510, 5 U.S.C. 301, and section 204 of the Americans with Disabilities Act, and for the reasons set forth in the preamble, chapter I of title 28 of the Code of Federal Regulations is proposed to be amended by adding a new part 35 to read as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

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35.170 Complaints.

35.171 Acceptance of complaints.

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35.173 Voluntary compliance agreements.

35.174 Referral.

35.175 Attorney's fees.

35.176 Alternative means of dispute resolution.

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35.179–35.189 [Reserved]

Subpart G—Designated Agencies

35.190 Designated agencies.

35.191–35.999 [Reserved]

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; title II, pub. L. 101–338 (42 U.S.C. 12134).

Subpart A—General

§ 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities.

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) Public transportation services, programs, and activities of public entities are covered by regulations implementing subtitle B of title II of the ADA issued by the Department of Transportation at 49 CFR part 37. The specific provisions of the Department of Transportation's regulation, including the limitations on those provisions, control over the general provisions in this part in circumstances where both specific and general provisions apply.

§ 35.103 Relationship to other laws.

This part does not invalidate or limit the remedies, rights, and procedures of any Federal laws, or State or local laws (including State common law), that

provide greater or equal protection for the rights of individuals with disabilities.

§ 35.104 Definitions.

For purposes of this part, the term—
Act means the Americans with Disabilities Act (Pub. L. 101–338, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes—

(1) Qualified interpreters, notetakers, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, television decoders, telecommunication devices for deaf persons (TDD's), or other effective methods of making orally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction, and alcoholism.

(iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term *disability* does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term *illegal use of drugs* does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such

services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A list of the interested persons consulted;
- (2) A description of areas examined and any problems identified; and
- (3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

§ 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and

equitable resolution of complaints alleging any action that would be prohibited by this part.

§§ 35.108–35.129 [Reserved]

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the

existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

§ 35.131 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.* A public entity shall not deny health services or services provided in connection with drug rehabilitation to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(c) *Drug testing.* (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 35.132 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

§ 35.133 Maintenance of accessible features.

A public entity shall maintain in operable working condition those

features of facilities and equipment that are required by the Act or this part to be readily accessible to and usable by persons with disabilities.

§ 35.134 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

§§ 35.135–35.139 [Reserved]

Subpart C—Employment

§ 35.140 Employment discrimination prohibited.

No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity. The definitions, requirements, and procedures of title I of the Act, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630, shall apply to employment in any service, program, or activity conducted by a public entity.

§§ 35.141–35.148 [Reserved]

Subpart D—Program Accessibility

§ 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

§ 35.150 Existing facilities.

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities

accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require a public entity to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods—*(1) *General.* A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Uniform Federal Accessibility Standards. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals

with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 35.150(a) of this part in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraphs (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include —

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* A public entity shall comply with the obligations established under this section within sixty days of the effective date of this regulation, except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this regulation, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of the effective date of this regulation, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(3) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph shall apply only to those policies and practices that were not included in the previous transition plan.

§ 35.151 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a public entity after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (Appendix A to 41 CFR part 101-19, subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those facilities. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic preservation.*

(1) In making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities.

(2) If it is not possible to provide physical access to an historic property without substantially impairing the historic features of the facility, alternative methods of accessibility shall be provided pursuant to the requirements of § 35.150.

§§ 35.152-35.159 [Reserved]

Subpart E—Communications

§ 35.160 General.

(a) A public entity shall take appropriate steps to ensure that

communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b) A public entity shall furnish appropriate auxiliary aids where necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(1) In determining what type of auxiliary aid is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

(2) A public entity need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

§ 35.151 Telecommunication devices for the deaf (TDD's).

Where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

§ 35.162 Telephone emergency services.

Telephone emergency services, including 911 services, must provide to individuals who use TDD's or computer modems access that is functionally equivalent to that provided to other telephone users. The services must be provided in all commonly used formats, such as Baudot and ASCII, that are compatible with these devices.

§ 35.163 Information and signage.

(a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and

administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

§§ 35.165–35.168 [Reserved]

Subpart F—Compliance Procedures

§ 35.170 Complaints.

(a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

§ 35.171 Acceptance of complaints.

(a) *Designated agency.* Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall determine under subpart G of this part whether it is the designated agency responsible for complaints filed against that public entity.

(1) If the agency determines that it is not the designated agency, it shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

(i) If the agency has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the agency does not have section 504 jurisdiction, it shall promptly notify the complainant that it is referring the complaint to the appropriate agency designated in subpart G of this part.

(2) If the agency determines that it is the designated agency under subpart G of this part, it shall promptly review the complaint to determine whether it has jurisdiction under section 504.

(i) If the designated agency has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the designated agency does not have section 504 jurisdiction, it shall process the complaint according to the procedures established by this subpart.

(b) *Employment complaints.* (1) Complaints alleging employment discrimination subject to both section 504 and this part shall be processed in accordance with procedures established in the coordination regulation issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.

(2) Complaints alleging employment discrimination subject to this part, but not to section 504, shall be referred to the Equal Employment Opportunity Commission for processing under the definitions, requirements, and procedures of title I of the Act, 29 CFR part 1630.

(c) *Complete complaints.* (1) A designated agency shall accept all complete complaints under this section and shall promptly notify the complainant and the public entity of the receipt and acceptance of the complaint.

(2) If the designated agency receives a complaint that is not complete, it shall notify the complainant and specify the additional information that is needed to make the complaint a complete complaint. If the complainant fails to complete the complaint, the designated agency shall close the complaint without prejudice.

§ 35.172 Resolution of complaints.

(a) The designated agency shall investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) Notice of the rights available under paragraph (b) of this section.

(b) If the designated agency finds no violation, the complainant may file a private suit pursuant to section 203 of the Act. If the designated agency finds noncompliance, the procedures in §§ 35.173 and 35.174 shall be followed. At any time, the complainant may file a private suit pursuant to section 203 of the Act.

§ 35.173 Voluntary compliance agreements.

(a) When the designated agency issues a noncompliance Letter of Findings, the designated agency shall—

(1) Notify the Assistant Attorney General by forwarding a copy of the Letter of Findings to the Assistant Attorney General; and

(2) Initiate negotiations with the public entity to secure compliance by voluntary means.

(b) Where the designated agency is able to secure voluntary compliance, the voluntary compliance agreement shall—

(1) Be in writing and signed by the parties;

(2) Address each cited violation;

(3) Specify the corrective or remedial action to be taken, within a stated period of time, to come into compliance;

(4) Provide assurance that discrimination will not recur; and

(5) Provide for enforcement by the Attorney General.

§ 35.174 Referral.

If the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.

§ 35.175 Attorney's fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 35.176 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 35.177 Effect of unavailability of technical assistance.

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

§ 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§§ 35.179-35.189 [Reserved]

Subpart G—Designated Agencies

§ 35.190 Designated agencies.

(a) The Assistant Attorney General shall coordinate compliance activities for State and local government components.

(b) The Federal agencies listed in paragraphs (b) (1) through (9) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(1) *Department of Agriculture:* All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.

(2) *Department of Commerce:* All programs, services, and regulatory activities relating to the development and operation of commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business.

(3) *Department of Education:* All programs, services, and regulatory activities relating to the operation of preschool and daycare programs, elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than medical and nursing schools), museums and libraries, the arts and humanities, and historic and cultural preservation.

(4) *Department of Health and Human Services:* All programs, services, and

regulatory activities relating to the provision of health care and social services including medical and nursing schools, and the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs.

(5) *Department of Housing and Urban Development:* All programs, services and regulatory activities relating to state and local public housing, housing assistance and referral, rent control, the real estate industry, and housing code administration.

(6) *Department of Interior:* All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, and energy.

(7) *Department of Justice:* All programs, services, and regulatory activities relating to public safety and the administration of justice, including courts; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e. g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

(8) *Department of Labor:* All programs, services, and regulatory activities relating to labor and the work force.

(9) *Department of Transportation:* All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

(c) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

§§ 35.191-35.999 [Reserved]

Dated: February 20, 1991.

Dick Thornburgh,
Attorney General.

[FR Doc. 91-4384 Filed 2-27-91; 8:45 am]

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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 36

[A.G. Order No. 1472-91]

Nondiscrimination On The Basis of Disability By Public Accommodations And In Commercial Facilities

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements title III of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by private entities in places of public accommodation, requires that all new places of public accommodation and commercial facilities be designed and constructed so as to be readily accessible to and usable by persons with disabilities, and requires that examinations or courses related to licensing or certification for professional and trade purposes be accessible to persons with disabilities.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 23, 1991. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, DC 20013.

Comments received will be available for public inspection in room 854 of the HOLC Building, 320 First Street, NW., Washington, DC, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from March 8, 1991 until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers.

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, Braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office on the Americans with Disabilities Act at (202) 514-0301 (Voice) or (202) 514-0381 (TDD). The notice of proposed rulemaking is also available on electronic bulletin board at (202) 514-6193. These telephone numbers are not toll-free numbers.

FOR FURTHER INFORMATION CONTACT: John Wodatch, Office on the Americans

with Disabilities Act and Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, and Janet Blizzard, Irene Bowen, Philip Breen, Merrily Friedlander, and Sara Kaltenborn, attorneys in the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530, may be contacted through the Division's ADA Information Line at (202) 514-0301 (Voice), (202) 514-0381 (TDD), or (202) 514-0383 (TDD). These telephone numbers are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The landmark Americans with Disabilities Act ("ADA" or "the Act"), enacted on July 26, 1990, provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommunications.

The legislation was originally developed by the National Council on Disability, an independent Federal agency that reviews and makes recommendations concerning Federal laws, programs, and policies affecting individuals with disabilities. In its 1986 study, "Toward Independence," the National Council on Disability recognized the inadequacy of the existing, limited patchwork of protections for individuals with disabilities, and recommended the enactment of a comprehensive civil rights law requiring equal opportunity for individuals with disabilities throughout American life. Although the 100th Congress did not act on the legislation, which was first introduced in 1988, then-Vice-President George Bush endorsed the concept of comprehensive disability rights legislation during his presidential campaign and became a dedicated advocate of the ADA.

The ADA was reintroduced in modified form in May 1989 for consideration by the 101st Congress. In June 1989, Attorney General Dick Thornburgh, in testimony before the Senate Committee on Labor and Human Resources, reiterated the Bush Administration's support for the ADA and suggested changes in the proposed legislation. After extensive negotiations between Senate sponsors and the Administration, the Senate passed an amended version of the ADA on September 7, 1989, by a vote of 76-8.

In the House, jurisdiction over the ADA was divided among four committees, each of which conducted extensive hearings and issued detailed committee reports: the Committee on Education and Labor, the Committee on

the Judiciary, the Committee on Public Works and Transportation, and the Committee on Energy and Commerce. On October 12, 1989, the Attorney General testified in favor of the legislation before the Committee on the Judiciary. The Civil Rights Division, on February 22, 1990, provided testimony to the Committee on Small Business, which although technically without jurisdiction over the bill, conducted hearings on the legislation's impact on small business.

After extensive committee consideration and floor debate, the House of Representatives passed an amended version of the Senate bill on May 22, 1990, by a vote of 403-20. After resolving their differences in conference, the Senate and House took final action on the bill—the House passing it by a vote of 377-28 on July 12, 1990, and the Senate, a day later, by a vote of 91-6. The ADA was enacted into law with the President's signature at a White House ceremony on July 26, 1990.

The Americans with Disabilities Act gives to individuals with disabilities civil rights protections with respect to discrimination that are parallel to those provided to individuals on the basis of race, color, national origin, sex, and religion. It combines in its own unique formula elements drawn principally from two key civil rights statutes—the Civil Rights Act of 1964 and title V of the Rehabilitation Act of 1973. The ADA generally employs the framework of titles II (42 U.S.C. 2000a to 2000a-6) and VII (42 U.S.C. 2000e to 2000e-16) of the Civil Rights Act of 1964 for coverage and enforcement and the terms and concepts of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for what constitutes discrimination.

The proposed rule establishes standards and procedures for the implementation of title III of the Act, which addresses discrimination by private entities in places of public accommodation, commercial facilities, and certain examinations and courses. The careful consideration Congress gave title III is reflected in the detailed statutory provisions and the expansive reports of the Senate Committee on Labor and Human Resources and the House Committees on the Judiciary, and Education and Labor. The proposed rule follows closely the language of the Act and supplements it where appropriate with material from the reports of the House committees. The text of the proposed rule and preamble draw heavily on the rich source of interpretive material found in the committee reports. In some instances, portions of the committee reports have been incorporated verbatim into the preamble

of the proposed rule. The proposed rule also in some areas reaches beyond issues squarely addressed by the statute or the committee reports in order to provide useful guidance to those businesses and other private entities that must comply with title III.

The proposed rule is organized into six subparts. Subpart A, "General," includes the purpose and application sections, describes the relationship of the Act to other laws, and defines key terms used in the regulation.

Subpart B, "General Requirements," contains material derived from what the statute calls the "General Rule," and the "General Prohibition," in sections 302(a) and 302(b)(1), respectively, of the Act. Topics addressed by this subpart include discriminatory denials of access or participation, landlord and tenant obligations, the provision of unequal benefits, indirect discrimination through contracting, the participation of individuals with disabilities in the most integrated setting appropriate to their needs, and discrimination resulting from association with individuals with disabilities. Subpart B also contains a number of "miscellaneous" provisions derived from title V of the Act that involve issues such as retaliation and coercion for asserting ADA rights, illegal drug use, insurance, and restrictions on smoking in places of public accommodation. Finally, subpart B contains additional general provisions regarding direct threats to health or safety, maintenance of accessible features of facilities and equipment, and the coverage of places of public accommodation located in private residences.

Subpart C, "Specific Requirements," addresses the "Specific Prohibitions" in section 302(b)(2) of the Act. Included in this subpart are topics such as discriminatory eligibility criteria; reasonable modifications in policies, practices or procedures; auxiliary aids; the readily achievable removal of barriers and alternatives to barrier removal; the extent to which inventories of accessible or special goods are required; seating in assembly areas; the purchase of furniture and equipment; and transportation provided by private entities not primarily engaged in the business of transporting people. Subpart C also incorporates the requirements of section 309 of title III relating to examinations and courses.

Subpart D, "New Construction and Alterations," sets forth the requirements for new construction and alterations based on section 303 of the Act. It addresses such issues as what facilities are covered by the new construction requirements what an alteration is, the

application of the elevator exception, the path of travel obligations resulting from an alteration to a primary function area, and the application of alterations requirements to historic buildings and facilities.

Subpart E, "Enforcement," describes the Act's title III enforcement procedures, including private actions, as well as investigations and litigation conducted by the Attorney General.

Subpart F, "Certification of State Laws or Local Building Codes," establishes procedures for the certification of State or local building accessibility ordinances that meet or exceed the new construction and alterations requirements of the ADA.

The section-by-section analysis of the proposed rule explains in detail the provisions of each of these subparts.

The Attorney General is also preparing a proposed rule for the implementation and enforcement of title II of the Act, which generally will extend the nondiscrimination mandate of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) (prohibiting discrimination against otherwise qualified individuals with handicaps on the basis of handicap in federally assisted programs), to all the operations of units of State and local government regardless of whether they receive Federal financial assistance. The title II rule, which will appear separately in the Federal Register, will address the operations of State and local government other than those involving public transportation systems.

Title II requirements for public transportation will be contained in regulations to be issued by the Department of Transportation. Among these requirements is a mandate that new public transit and rail vehicles be accessible to individuals with disabilities. The DOT regulations will also contain accessibility requirements for both existing and new transit stations and terminals under title II, as well as for vehicles operated by private entities under title III.

Title I of the Act prohibits discrimination against qualified individuals with disabilities in employment practices. Its core requirement is that employers make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee, unless the accommodation would impose an undue hardship on the employer. The employment requirements will extend widely throughout the private sector. Effective July 26, 1992, title I will cover employers with 25 or more employees; and on July 26, 1994, coverage will be extended to

employers with 15 or more employees. The Equal Employment Opportunity Commission will issue a proposed regulation for the implementation of title I.

Finally, the Federal Communications Commission will be issuing regulations to implement title IV of the ADA, which requires telephone companies to establish telecommunications relay services. These relay services will enable two-way communication between an individual who uses a TDD (telecommunications device for the deaf) or another nonvoice terminal device and an individual who uses a standard telephone.

Other recently enacted legislation will facilitate compliance with the ADA. As amended in 1990, the Internal Revenue Code allows a deduction of up to \$15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed \$1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing auxiliary aids, and acquiring or modifying equipment or devices.

In addition, the Communications Act of 1934 has been amended by the Television Decoder Circuitry Act of 1990, Public Law 101-431, to require as of July 1, 1993, that all televisions with screens of 13" or wider have built in decoder circuitry for displaying closed captions. This new law will eventually lessen dependence on the use of portable decoders in achieving compliance with the auxiliary aids requirements of the proposed rule.

Section-By-Section Analysis

Subpart A—General

Section 36.101 Purpose.

Section 36.101 states the purpose of the proposed rule, which is to effectuate title III of the Americans with Disabilities Act of 1990. This title prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the

under the commerce clause of the Constitution.

Privately operated airports are also included in the category of commercial facilities. They are not, however, places of public accommodation because they are not terminals used for "specified public transportation." (Transportation by aircraft is specifically excluded from the statutory definition of "specified public transportation.") Thus, privately operated airports are subject to the new construction and alteration requirements of this rule (subpart D) but not to subparts B and C.

The statute's definition of "commercial facilities" specifically includes only facilities "that are intended for nonresidential use" and specifically exempts those facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601-3631). Places of lodging (e.g., hotels and inns, primarily intended for transitory stays) are designated as places of public accommodation. Places used for longer stays (e.g., residential hotels) are not considered "commercial facilities" because they are residential facilities. Thus the nontransitory, residential portions of a facility would not be subject to any requirements of title III, including the new construction and alteration requirements, because they are neither a place of public accommodation nor a nonresidential facility. They would be subject to the Fair Housing Act, which imposes nondiscrimination requirements (including specific requirements for new construction of certain residential facilities) on "dwellings," which are buildings or portions of buildings used as residences.

Current illegal use of drugs. The phrase "current illegal use of drugs" is used in § 36.209. Its meaning is discussed in the preamble for that section.

Disability. The definition of the term "disability" is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act of 1973 and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulations implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply

fully to the term "disability." Education and Labor report at 50.

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Congress to make use of up-to-date, currently accepted terminology. The terminology applied to individuals with disabilities is a very significant and sensitive issue. As with racial and ethnic terms, the choice of words to describe a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

The term "*disability*" means, with respect to an individual—

- (A) A permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment.

If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. It has worked well since it was adopted in 1974. There is a substantial body of administrative interpretation and judicial precedent on this definition. Finally, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

Test A—A physical or mental impairment that substantially limits one or more of the major life activities of such individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This is the list used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. However, the list of examples in paragraph (1)(iii) of the definition includes: orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction, and alcoholism.

The examples of "physical or mental impairments" in paragraph (1)(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the

definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment which may substantially limit a major life activity either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 346 (1989).

Paragraph (1)(iv) of the definition states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they

can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

An impairment is not necessarily excluded from the definition of "disability" simply because it is temporary. The duration, or expected duration, of an impairment is, however, one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. Temporary impairments, such as a broken leg, are not commonly regarded as disabilities, but in rare circumstances the degree of the limitation and its expected duration may be substantial. Similarly, obesity rarely results in a substantial limitation on a major life activity. It must be emphasized that each case involving a determination of substantial limitation must be evaluated on its own merits.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Test B—A record of such an impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the proposed rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the

first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Test C—Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a private entity or public accommodation as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the private entity or public accommodation is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test. A person would be covered under this test if a restaurant refused to serve that person because of a fear of "negative reactions" of others to that person. A person would also be covered if a public accommodation refused to serve a patron because it perceived that the patron had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, severe burn victims often face discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if the victims did not view themselves as "impaired".

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

Thus, a person who is not allowed into a public accommodation because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public accommodation can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public accommodation's perception is inaccurate (e.g., that he will be accepted by others, or that insurance rates will not increase) in order to be admitted to the public accommodation.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)) or section 504, the conditions listed in paragraph (5), except for transvestism,

are not necessarily excluded as impairments under section 504.

(Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 6(b)). The phrase "current illegal use of drugs" used in this definition is explained in the preamble to section 36.209.

Drug. The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

Facility. "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Senate and House committee reports made clear that the definition of facility was drawn from the definition of facility in the current Federal regulations implementing section 504 of the Rehabilitation Act (Education and Labor report at 114). It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment. The definition from the section 504 regulations has been changed only to the extent necessary to comply with the Act and this part. The term "rolling stock or other conveyances" has been deleted from the definition of facility because vehicles are not included in the concept of facility under this part. Requirements pertaining to accessible transportation services provided by places of public accommodation are included in § 36.311 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR part 37. The definition only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. (Public entities are subject to the requirements of title II of the Act, and the implementing regulations that will be codified at 28 CFR part 35.)

Illegal use of drugs. The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

Individual with a disability means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public accommodation acts on the basis of

such use. The phrase "current illegal use of drugs" is explained in the preamble to § 36.209.

Place of public accommodation. The term "place of public accommodation" is an adaptation of the statutory definition of "public accommodation" in section 301(7) of the ADA and appears as an element of the proposed regulatory definition of public accommodation. The proposed rule defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 specified categories. The term "public accommodation," on the other hand, is reserved by the proposed rule for the private entity that owns, leases (or leases to), or operates a place of public accommodation. It is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirements. Placing the obligation not to discriminate on the public accommodation, as defined in the proposed rule, is consistent with section 302(a) of the ADA, which places the obligation not to discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation.

Facilities operated by government agencies or other public entities as defined in this section do not qualify as places of public accommodation. The actions of public entities are governed by title II of the ADA and will be subject to regulations issued by the Department of Justice under that title. The receipt of government assistance by a private entity does not by itself preclude a facility from being considered as a place of public accommodation.

The definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA:

1. Places of lodging.
2. Establishments serving food or drink.
3. Places of exhibition or entertainment.
4. Places of public gathering.
5. Sales or rental establishments.
6. Service establishments.
7. Stations used for specified public transportation.
8. Places of public display or collection.
9. Places of recreation.
10. Places of education.
11. Social service center establishments.
12. Places of exercise or recreation.

In order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce, and it must fall within one of these 12 categories. While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given. The category of sales or rental establishments, for instance, would include an innumerable array of facilities that would sweep far beyond the few examples given in the regulation. For example, other retail or wholesale establishments selling or renting items, such as bookstores, videotape rental stores, pet stores, and jewelry stores would also be covered under this category, even though they are not specifically listed.

Even if a facility does not fall within one of the 12 categories, and therefore does not qualify as a place of public accommodation, it still may be a commercial facility as defined in § 36.104 and subject to the new construction and alterations requirements of subpart D.

The category "places of lodging" does not include residential facilities. For example, in a large hotel that has a residential apartment wing, the residential wing would be covered under the Fair Housing Act, but not by the ADA. The nonresidential accommodations in the rest of the hotel would be a place of public accommodation under this regulation.

Facilities that offer housing on a transient or institutional basis may be considered places of public accommodation, if they fall within one of the 12 categories and otherwise meet the requirements of the definition. For example, hospitals fall under the category of service establishment and homeless shelters are classified as social service center establishments.

A private home, by itself, does not fall within any of the 12 categories. However, it can be covered as a place of public accommodation to the extent that it is used as a facility that would fall within one of the 12 categories. For example, if a professional office of a dentist, doctor, or psychologist is located in a private home, the portion of the home dedicated to office use (including areas used both for the residence and the office, e.g., the entrance to the home) would be considered a place of public accommodation. Public accommodations located in residential facilities are specifically addressed in § 36.207.

If a tour of a commercial facility that is not otherwise a place of public

accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the proposed rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of § 36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Public accommodations that receive Federal financial assistance are subject to the requirements of section 504 of the Rehabilitation Act as well as the requirements of the ADA.

Private schools, including elementary and secondary schools, are covered by the proposed rule as places of public accommodation. The proposed rule by itself, however, does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing section 504 of the Rehabilitation Act of 1973 (34 CFR part 104) and regulations implementing part B of the Education of All Handicapped Children Act (34 CFR part 300). The receipt of Federal assistance by a private school, however, would trigger application of the Department of Education's regulations to the extent mandated by the particular type of assistance received.

Private club. The term "private club" is defined in accordance with section 307 of the ADA as a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964. Title II of the 1964 Act exempts any "private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of a place of public accommodation as defined in title II)." The proposed rule, therefore, as reflected in § 36.102(e) of the application section, limits the coverage of private clubs accordingly. The obligations of a private club that rents space to any

other private entity for the operation of a place of public accommodation are discussed further in connection with § 36.201.

In determining whether a private entity qualifies as a private club under title II, courts have considered such factors as the degree of member control of club operations, the selectivity of the membership selection process, whether substantial membership fees are charged, whether the entity is operated on a nonprofit basis, the extent to which the facilities are open to the public, the degree of public funding, and whether the club was created specifically to avoid compliance with the Civil Rights Act. *See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Daniel v. Paul*, 395 U.S. 298 (1969); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Anderson v. Pass Christian Isles Golf Club, Inc.*, 488 F.2d 855 (5th Cir. 1974); *Smith v. YMCA*, 462 F.2d 834 (5th Cir. 1972); *Stout v. YMCA*, 404 F.2d 687 (5th Cir. 1968); *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968); *Nesmith v. YMCA*, 397 F.2d 98 (4th Cir. 1968); *United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989); *Durham v. Red Lake Fishing and Hunting Club, Inc.*, 666 F. Supp. 954 (W.D. Tex. v. 1987); *New York v. Ocean Club, Inc.*, 602 F. Supp. 489 (E.D.N.Y. 1984); *Brown v. Loudoun Golf and Country Club, Inc.*, 573 F. Supp. 399 (E.D. Va. 1983); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 322 F. Supp. 1182 (D. Conn. 1974).

Private entity. The term "private entity" is defined as any individual or entity other than a public entity. It is used as part of the definition of "public accommodation" in this section.

The proposed definition adds "individual" to the statutory definition of private entity (*see* section 301(6) of the ADA). This addition clarifies that an individual may be a private entity and, therefore, may be considered a public accommodation if he or she owns, leases (or leases to), or operates a place of public accommodation. The explicit inclusion of individuals under the definition of private entity is consistent with section 302(a) of the ADA, which broadly prohibits discrimination on the basis of disability by any person who owns, leases (or leases to), or operates a place of public accommodation.

Professional office of a health care provider. This term is explained in the discussion of § 36.401 in the preamble.

Public accommodation. The term "public accommodation" means a private entity that owns, leases (or

leases to), or operates a place of public accommodation. The regulatory term, "public accommodation," corresponds to the statutory term, "person," in section 302(a) of the ADA. The ADA prohibits discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation." The text of the proposed regulation consequently places the ADA's nondiscrimination obligations on "public accommodations" rather than on "persons" or on "places of public accommodation."

As stated in proposed § 36.102(b)(2), the requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. A public accommodation must also meet the requirements of subpart D with respect to facilities used as, or designed or constructed for use as, places of public accommodation or commercial facilities.

The respective obligations of landlord public accommodations and tenant public accommodations are addressed in § 36.201(b) of the proposed rule. The terms "commercial facility," "place of public accommodation," and "private entity," each of which is used in the definition of public accommodation, are defined in § 36.104.

Public entity. The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). It is used in the definition of "private entity" in § 36.104. Public entities are excluded from the definition of private entity and therefore cannot qualify as public accommodations under this regulation. However, the actions of public entities are covered by title II of the ADA and will be subject to regulations to be issued by the Department of Justice to implement that title.

Readily achievable. The definition of "readily achievable" follows the statutory definition of that term in section 301(9) of the ADA. Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. The term is used as a limitation on the obligation to remove barriers under §§ 36.304(a), 36.305(a), 36.308(a), 36.309(b), and 36.311(b). Factors to be considered in determining whether an action is readily achievable are listed in § 36.306. A fuller discussion of the meaning and application of the term "readily

achievable" may be found in those portions of the preamble addressing §§ 36.304 and 36.306.

Religious entity. The term "religious entity" is defined in accordance with section 307 of the ADA as a religious organization or entity controlled by a religious organization, including a place of worship. Section 36.102(e) of the proposed rule states that the rule does not apply to any religious entity.

Although religious entities have no obligations under the proposed rule, public accommodations that are not religious entities, but that operate a place of public accommodation, such as a day care center, food bank, senior citizens center, or private school, in rented or donated space on the property of a religious entity, are subject to the rule's requirements if not under control of the religious entity.

Service animal. The term "service animal" encompasses any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability. The term is used in § 36.302(c), which establishes certain requirements for modifying policies, practices, and procedures to accommodate the use of service animals in places of public accommodation.

Shopping center or shopping mall. This term is explained in the preamble discussion of § 36.401.

Specified public transportation. The definition of "specified public transportation" is identical to the statutory definition in section 301(10) of the ADA. The term means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. It is used in category (7) of the definition of "place of public accommodation," which includes stations used for specified public transportation.

The effect of this definition, which excludes transportation by aircraft, is that it excludes privately operated airports from coverage as places of public accommodation. However, airports that are operated by public entities are covered by title II of the ADA and, if they are operated as part of a program receiving Federal financial assistance, by section 504 of the Rehabilitation Act. Privately operated airports are similarly covered by section 504 if they are operated as part of a program receiving Federal financial assistance. The operations of any portion of any airport that are under the control of an air carrier are covered by

the Air Carrier Access Act. In addition, airports are covered as commercial facilities under this rule.

State. The definition of "State" is identical to the statutory definition in section 3(3) of the ADA. The term is used in the definitions of "commerce" and "public entity" in § 36.104.

Undue burden. The definition of "undue burden" is analogous to the statutory definition of "undue hardship" in employment under section 101(10) of the ADA. The term undue burden means "significant difficulty or expense" and serves as a limitation on the obligation to provide auxiliary aids and services under § 36.303 of the proposed rule. Further discussion of the meaning and application of the term undue burden may be found in the preamble discussion of §§ 36.303 and 36.306.

Subpart B—General Requirements

Subpart B includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services, by giving them unequal goods or services, or by giving them different or separate goods or services. These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, color, religion, or national origin.

Section 36.201 General

Section 36.201(a) contains the general rule that prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.

Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

Section 302(a) of the ADA states that the prohibition against discrimination applies to "any person who owns, leases (or leases to), or operates a place of public accommodation," and this language is reflected in § 36.201(a). The coverage is quite extensive and would

include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation. Although this language could be interpreted as placing equal responsibility on all private entities, whether lessor, lessee, or operator of a public accommodation, the committee reports suggest that the responsibilities may be allocated. Section 36.201 adopts the approach suggested by the committee reports.

An entity that is not in and of itself a public accommodation, such as a trade association or performing artist, may become a public accommodation when it leases space for a conference or performance at a hotel, convention center, or stadium (unless the entity leasing space is a private club exempt from the ADA). As a public accommodation, the trade association or performing artist will be responsible for compliance with this part as regards the operations of the place of public accommodation. Accordingly, it is the responsibility of the lessee to provide auxiliary aids (which could include interpreters, braille programs, etc.) for the participants in its conference or performance as well as to assure that displays are accessible to individuals with disabilities.

Section 36.201(b) delineates the respective obligations of landlords and tenants under the ADA. Paragraph (b)(1) of that section states the general principle that the landlord that owns the building that houses the place of public accommodation, as well as the tenant that owns or operates the place of public accommodation, are public accommodations that have obligations under this part.

Paragraph (b)(2) of that section concerns the allocation of responsibilities for taking readily achievable measures to remove barriers. Paragraph (b)(2)(i) states the general principle that the landlord is responsible for making readily achievable changes in common areas and for modifying policies, practices, or procedures applicable to all tenants, unless provided otherwise by contract.

Paragraph (b)(2)(ii) of that section explains responsibilities of tenants for making readily achievable modifications when the lease gives the tenant the right to make alterations within the place of public accommodation with permission of the landlord. In other words, it explains responsibilities when both the tenant and landlord have contractual authority to make alterations. Commonly, this type of lease will indicate that such permission cannot be unreasonably withheld by the landlord.

Paragraph (b)(2)(ii)(A) indicates that when a tenant has signed such a lease, the tenant's first responsibility is to request permission to make any readily achievable modification that is required by this part. If the permission is granted, paragraph (b)(2)(ii)(B) requires the tenant to make the readily achievable modification.

Paragraph (b)(2)(ii)(C) addresses the situation in which permission is granted but the modification required to permit access is not readily achievable for the tenant. In such a case, the tenant is not required to remove the barrier. Instead, the obligation is transferred to the landlord and the landlord must remove the barrier if the particular modification is readily achievable for the landlord to undertake. This same analysis would apply for each modification needed, i.e., if it is not readily achievable for the tenant but it is readily achievable for the landlord, the landlord must take the action. In other words, because the tenant and landlord are both public accommodations" as defined in § 36.104 (because each of them either leases, owns, or operates a place of public accommodation), they both have responsibility to remove barriers.

Paragraph (b)(2)(iii) states that in cases where the lease reserves authority for making modifications solely to the landlord, the landlord is responsible for making readily achievable modifications required by this part. The landlord is also solely responsible for readily achievable modifications if the tenant requested permission pursuant to paragraph (b)(2)(ii)(A), but permission was withheld by the landlord.

Paragraph (b)(2)(iv) contains an illustration of this principle. If an office building contains a doctor's office, both the owner of the building and the doctor's office are required to make readily achievable modifications. It simply makes no practical sense to require the tenant to make readily achievable changes within the place of public accommodation, in this case the doctor's office, without also requiring the owner to make readily achievable changes to the primary entrance to the building.

Section 36.201(b)(2) is an attempt to recognize the basic principle that legal responsibility for making readily achievable changes depends upon who has the legal authority to make modifications, which is generally determined by the contractual agreement between the landlord and tenant. The ADA was not intended to change the existing landlord/tenant responsibilities as set forth in the lease.

The Department seeks comment on the rule's allocation of responsibilities between landlord and tenant and its practical effects. In addition, the Department seeks comment on whether landlord and tenant obligations under § 36.201 (b)(2) should vary depending on the length of time remaining on an existing lease. For example, to what extent should landlord and tenant obligations under a lease with only 30 days remaining differ from those under a lease that will be in effect for 10 more years?

The dual responsibilities set forth in paragraph (b)(2) only apply when both the landlord and the tenant are public accommodations. In the situation where the landlord is a religious entity, the landlord is not a public accommodation because religious entities are exempt from ADA coverage. Thus, if a church were to rent space to a nonreligious private entity to operate a place of public accommodation, such as a nonsectarian day care center, the church would have no responsibilities for compliance. In other words, the church is not "a person who * * * leases to * * * a place of public accommodation" under section 302(a) of the ADA. Only the day care center would be subject to paragraph (b)(2).

Similarly, if a church leases its basement hall to a performing artist, the church will have no responsibilities for compliance. Like the day care center in the preceding example, however, the performing artist will be subject to paragraph (b)(2). As explained above, an entity that is not generally a public accommodation can become a public accommodation when it leases space for its performance, conference, etc. In this case, the performing artist becomes a public accommodation when it leases the church hall for its performance. Although the church is totally exempt from any responsibilities, the performing artist is now a public accommodation subject to the ADA.

Private clubs are also exempt from the ADA. However, consistent with title II of the Civil Rights Act, 42 U.S.C. 2000a(e), a private club is considered a public accommodation to the extent that "the facilities of such establishment are made available to the customers or patrons" of a place of public accommodation. Thus, if a private club runs a day care center that is open exclusively to its own members, the club, like the church in the example above, would have no responsibility for compliance with the ADA. Nor would the day care center have any responsibilities because it is part of the private club exempt from the ADA.

On the other hand, if the private club rents to a day care center that is open to the public, then the private club would have the same obligations as other public accommodation landlords with respect to removal of barriers within the day care center. In such a situation, both the private club that "leases to" a public accommodation and the public accommodation lessee (the day care center) would be subject to paragraph (b)(2). This same principle would apply if the private club were to rent to, for example, a bar association, which is not generally a public accommodation but which, as explained above, becomes a public accommodation when it leases space for a conference.

Section 36.201(b)(3) concerns the responsibility for providing auxiliary aids. Paragraph (b)(3)(i) of that section states that the tenant is responsible for providing auxiliary aids such as interpreters, Braille or large print notices within the place of public accommodation, and the landlord is responsible for providing auxiliary aids in common areas. Unlike under paragraph (b)(2), in which barrier removal is involved and there are overlapping responsibilities, with the landlord retaining ultimate responsibility for removal of barriers within the tenant's place of public accommodation, paragraph (b)(3)(i) places responsibility for auxiliary aids that are nonstructural in nature solely upon the tenant. The landlord is only responsible for providing auxiliary aids in common areas. Paragraph (b)(3)(ii) is an illustration of this principle. It states that the tenant operating a lawyer's office must provide auxiliary aids within the lawyer's office. However, the doorman or guard to the office building containing the lawyer's office would be required, if requested, to show a person who is blind to the elevator or to write a note to a person who is deaf regarding the floor number of the lawyer's office.

Section 36.201(b)(4) concerns the respective obligations in the cases of alterations that trigger the path of travel requirement under § 36.403. If a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not making alterations to other parts of the facility, then the alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered. The path of travel requirement

applies only to the entity that is already making the alteration.

Section 36.202 Activities

Section 36.202 sets out the general forms of discrimination prohibited by title III of the ADA. These general prohibitions are further refined by the specific prohibitions in subpart C.

Deny participation—Section 36.202(a) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

A public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part. For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities. This is a frequent basis of exclusion from a variety of community activities and is prohibited by this part.

Unequal benefit—Section 36.202(b) prohibits services or accommodations which are not equal to those provided others. For example, persons with disabilities must not be limited to certain performances at a theater.

Separate benefit—Section 36.202(c) permits different or separate benefits or services only when necessary to provide persons with disabilities opportunities as effective as those provided others. Thus, this section would not prohibit the designation of restrooms or parking spaces for persons with disabilities.

Each of the three paragraphs (a)–(c) prohibits discrimination against an individual or class of individuals "either directly or through contractual, licensing, or other arrangements." The intent of the contractual prohibitions of these paragraphs is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced in the three paragraphs is intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. It is not intended to encompass the clients or customers of other entities. Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers. Section 36.202(d) makes this clear by providing that the term "individual or class of

individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

Section 36.203 Integrated settings

Section 36.203 concerns integration, which is fundamental to the purposes of the Americans with Disabilities Act. Providing segregated accommodations and services relegates persons with disabilities to second-class citizen status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate.

Section 36.203(b) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Section 306.203(c), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

These provisions should not be construed to jeopardize in any way the continued viability of separate private schools providing special education for particular categories of children with disabilities, sheltered workshops, special recreational programs, and other similar programs.

At the same time, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used

to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for an establishment to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Section 36.204 Administrative methods

Section 36.204 specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. The preamble discussion of § 36.301 addresses eligibility criteria in detail.

Section 36.204 is derived from section 302(b)(1)(D) of the Americans with Disabilities Act, and it uses the same language used in the employment section of the ADA (section 102(b)(3)). Both sections incorporate a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297 (footnote omitted).

Of course, § 36.204 is subject to the various limitations contained in subpart C including, for example, necessity

(§ 36.301(a)), safety (§ 36.301(b)), fundamental alteration (§ 36.302(a)), readily achievable (§ 36.304(a)), and undue burden (§ 36.303(a)).

Section 36.205 Association

Section 36.205 implements section 302(b)(1)(E) of the Act, which provides that a public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodation, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

The individuals covered under this section are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this part for a day care center to refuse admission to a child whose brother has HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. During the legislative process, Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a place of public accommodation refuses admission to a person with cerebral palsy, and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 36.206 Retaliation or coercion

Section 36.206 implements section 503 of the ADA, which prohibits retaliation against any person who exercises his or her rights under the Act. Paragraph (a) of § 36.206 provides that no person, private entity, or public entity, shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or

because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no person, private entity, or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

Paragraph (c) is modeled on a similar provision in the regulations issued by the Department of Housing and Urban Development to implement the Fair Housing Act. (*See* 24 CFR 100.400(c)(1)). Paragraph (c) contains examples of conduct that would violate this section, including: (1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part; (2) Threatening, intimidating, or interfering with an individual who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation; (3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or (4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

Section 36.207 Places of public accommodation located in private residences

A private home used exclusively as a residence is not covered by title III because it is neither a "commercial facility" nor a "public accommodation."

There are many times, however, in which a private home is not used exclusively as a residence. In some situations, all or part of a home may also be used to house a place of public accommodation. Section 36.207 provides that those portions of the private residence used in the operation of the place of public accommodation are covered by this part. For instance, a home or a portion of a home may be used as a day care center during the day and a residence at night. If all parts of the house are used for the day care center, then the entire residence is a place of public accommodation because no part of the house is used exclusively as a residence. Another example is the accountant who uses one room in the house solely as his or her professional office. In this situation, there is a portion of the house used exclusively as a place

of public accommodation and a portion used exclusively as a residence. Section 36.207 provides that when a portion of a residence is used exclusively as a residence, that portion is not covered by this part. Thus, the portions of the accountant's house other than the professional office are not covered by this part.

This same principle would apply to a commercial facility located in a private residence. However, only the new construction and alteration requirements of subpart D apply to commercial facilities. Accordingly, the portion of the home used exclusively as a commercial facility or used as both a residence and a commercial facility would be subject to subpart D.

Section 36.208 Direct threat

Section 36.208(a) implements section 302(b)(3) of the Act by providing that this part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if that individual poses a direct threat to the health or safety of others. The inclusion of this provision is not intended to imply that persons with disabilities pose risks to others. It is intended to address concerns that may arise in this area. It establishes a strict standard that must be met before denying service to an individual with a disability or excluding that individual from participation.

Paragraph (b) of this section explains that a "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. This paragraph codifies the standard first applied by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which the Court held that an individual with a contagious disease may be an "individual with handicaps" under section 504 of the Rehabilitation Act. In *Arline*, the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others may be excluded if reasonable modifications to the public accommodation's policies, practices, or procedures will not eliminate that risk. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular

disability; it must be based on an individual assessment that conforms to the requirements of paragraph (c) of this section.

Paragraph (c) establishes the test to use in determining whether an individual poses a direct threat to the health or safety of others. A public accommodation is required to make an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the Centers for Disease Control and the National Institute of Health.

Section 36.209 Illegal use of drugs

Section 36.209 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Alcohol is not a controlled substance, so use of alcohol is not affected by § 36.209 (although alcoholics are individuals with disabilities, subject to the protections of the statute). Section 36.209 also does not affect use of controlled substances pursuant to a valid prescription, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It is the use of the substance, rather than the substance itself, that is illegal.

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the

illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in § 36.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. As explained further in the discussion of § 36.302, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully, is no longer engaging in the illegal use of

drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 36.209(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures which would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs."

Section 36.210 Smoking

Section 36.210 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking.

Section 36.211 Maintenance of accessible features

Section 36.211 provides that a public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and *usable by*, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked automatic doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Therefore, it is not intended that isolated instances of mechanical failure be considered violations of the Act or this part. However, repeated mechanical failures due to improper or inadequate maintenance would violate this part. Failure of the public accommodation to ensure that accessible routes are properly maintained and free of

obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

It would, for example, be a violation of this section if a cruise ship that offered passenger activities on several decks connected by one elevator failed to maintain that elevator in operating condition throughout each cruise. A failure to maintain the elevator in operating condition would require passengers with disabilities who require the use of the elevator to choose between foregoing access to cruise activities for which they have paid or experiencing the indignity—and the risk of injury—inherent in being carried between decks. Either option would constitute a failure on the part of the cruise ship to provide its services to passengers who have mobility impairments in a manner comparable to that in which they are provided to other passengers, and is, therefore, a violation of the Act.

Section 36.212 Insurance

Section 36.212(a) restates section 501(c) of the Act, which provides that the Act shall not be construed to restrict certain insurance practices on the part of insurance companies and employers, as long as such practices are not used to evade the purposes of the Act.

The definition of “public accommodation” in section 301(7)(F) of the Act specifically includes “insurance office.” Although the committee reports say that the Act is not intended to “disrupt the current nature of insurance underwriting” (S. Rep. No. 116, 101st Cong., 1st Sess., at 84 (1989) [hereinafter “Senate report”]; Education and Labor report at 136), they also say that “[u]nder the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks” (Senate report at 84; Education and Labor report at 136). Section 501(c)(1) of the Act was intended to emphasize that “insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation”. (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 70 (1990) [hereinafter “Judiciary report”] (emphasis added); see also Senate report at 85; Education and Labor report at 137).

The committee reports indicate that underwriting and classification of risks

must be “based on sound actuarial principles or be related to actual or reasonably anticipated experience” (see, e.g., Judiciary report at 71). Moreover, “while a plan which limits certain kinds of coverage based on classification of risk would be allowed * * *, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience” (Senate report at 85; Education and Labor report at 136–37; Judiciary report at 71). The ADA, therefore, does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance. The Department requests comment on the extent to which data that would establish statistically sound correlations are available.

The committee reports provide some guidance on how nondiscrimination principles in the disability rights area relate to insurance practices. For example, a person who is blind may not be denied coverage based on blindness independent of actuarial risk classification. With respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy, but cannot be denied coverage for illness or injuries unrelated to the pre-existing condition. Also, a public accommodation may offer insurance policies that limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability.

The Department requests comments on the experience under State laws that prohibit discrimination in insurance on the basis of disability.

Section 36.212(b) is a specific application of § 36.202(a), which prohibits denial of participation on the basis of disability. It provides that a public accommodation may not refuse to serve an individual with a disability because of limitations on coverage or rates in its insurance policies. See Judiciary report at 56.

Section 36.213 Relationship of subpart B to subparts C and D

This section explains that subpart B sets forth the general principles of nondiscrimination applicable to all entities subject to this regulation, while subparts C and D provide guidance on

the application of this part to specific situations. The specific provisions in subparts C and D, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply. Resort to the general provisions of subpart B is only appropriate where there are no applicable specific rules of guidance in subparts C or D. This interaction between the specific requirements and the general requirements operates with regard to contractual obligations as well.

One illustration of this principle is its application to the obligation of a public accommodation to provide access to assembly areas, such as theaters or sports arenas, by persons who use wheelchairs. The general requirement, established in subpart B by § 36.203, is that a public accommodation must provide its services (in this case, the use of the assembly area) to individuals with disabilities in the most integrated setting appropriate. This general requirement would appear to categorically prohibit "segregated" entitled "Seating for persons in wheelchairs at the back of the assembly area." This requirement, however, must be read in conjunction with § 36.308, "Seating in assembly areas."

Section 36.203 does not specify how a public accommodation should make its services available. Those provisions are in § 36.308 of subpart C, which establishes specific minimum requirements for accessible seating in assembly areas. Section 36.308 requires, for example, that a public accommodation in an existing facility, to the extent that it is readily achievable, must:

- (1) Provide a reasonable number of wheelchair seating spaces in assembly areas;

- (2) Locate the wheelchair seating spaces so that they are dispersed throughout the seating area; and provide lines of sight comparable to those for all viewing areas;

- (3) Locate the wheelchair seating areas so that they adjoin an accessible route that also serves as a means of egress in case of emergency;

- (4) Permit individuals who use wheelchairs to sit with family members or other companions. If removal of seats is not readily achievable, a public accommodation shall provide a portable chair or other means to permit a family member or other companion to sit with an individual who uses a wheelchair.

In new construction and alterations, the provision and location of wheelchair seating spaces is governed by the standards for new construction and

alterations specified in subpart D (§§ 36.401-36.406).

Subpart C—Specific Requirements

In general, subpart C implements the "specific prohibitions" that comprise section 302(b)(2) of the ADA. It also addresses the requirements of section 309 of the ADA regarding examinations and courses.

Section 36.301 Eligibility criteria

Section 36.301 of the proposed rule prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. This prohibition is based on section 302(b)(2)(A)(i) of the ADA.

It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater, or limit the seating of individuals with Down's syndrome to only particular areas of a restaurant. The wishes, tastes, or preferences of other customers may not be asserted to justify criteria that would exclude or segregate individuals with disabilities.

Section 36.301 also prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability; for example, it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, mental illness, or any other disability.

Section 36.301 also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. As a result, public accommodations may not require that an individual with disabilities be accompanied by an attendant. As provided by §§ 36.303(g) and 36.305(c), however, a public accommodation is not required to provide assistance in toileting, feeding, or dressing. Public accommodations also may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal,

alternatives to barrier removal, and reasonable modifications in policies, practices, and procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

In addition, § 36.301 prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo ID, or credit card, is feasible.

A public accommodation may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the public accommodation. Examples of safety qualifications that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Section 36.302 Modifications in policies, practices, or procedures

Section 36.302 of the proposed rule prohibits the failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. This prohibition is based on section 302(b)(2)(A)(ii) of the ADA.

For example, a parking facility may be required to modify a rule barring all vans with raised roofs (including those that are wheelchair accessible), if a

wheelchair-user operating such a van wishes to park in the facility and overhead structures are, in fact, high enough to accommodate the height of the van. Likewise, a department store may need to modify a policy of only permitting one person at a time in a dressing room, if a mentally retarded individual needs and requests assistance in dressing from a companion.

The proposed rule does not require modifications to the legitimate areas of specialization of service providers. Section 36.302(b) provides that a public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

For example, it would not be discriminatory for a physician who specializes only in burn treatment to refer an individual who is deaf to another physician for treatment of an injury other than a burn injury. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice and, therefore, not be required by this section.

A clinic specializing exclusively in drug rehabilitation could similarly refuse to treat a person who is not a drug addict, but could not refuse to treat a person who is a drug addict simply because the patient tests positive for HIV. Conversely, a clinic that specializes in the treatment of individuals with HIV could refuse to treat an individual that does not have HIV but could not refuse to treat a person for HIV infection simply because that person is also a drug addict.

Section 36.302(c)(1) requires that a public accommodation modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public. The term "service animal" is defined in § 36.104 to include guide dogs, signal dogs, or any other animal individually trained to provide assistance to an individual with a disability. Under this requirement, a service animal may not be excluded from the customer areas of, for example, movie theaters, restaurants, or retail stores; or from the patient areas of hospitals or nursing homes during public visiting hours. Requiring an individual with a disability to be separated from a

service animal in any area open to the general public would violate this section.

With respect to areas that are not open to the general public, § 36.302(c)(2) requires that a public accommodation permit the use of a service animal to the extent that it would not fundamentally alter the nature of the goods, services, facilities, privileges, or accommodations offered or provided by the public accommodation or jeopardize its safe operation.

As specified in § 36.302(c)(3), the proposed rule does not require a public accommodation to supervise or care for any service animal. If, in an area not open to the general public, a service animal must be separated from an individual with a disability in order to avoid a fundamental alteration or a threat to safety under § 36.302(c)(2), it is the responsibility of the individual to arrange for the care and supervision of the animal during the period of separation.

A museum would not be required by § 36.302 to modify a policy barring the touching of delicate works of art in order to enhance the participation of individuals who are blind, if the touching threatened the integrity of the work. Damage to a museum piece would clearly be a fundamental alteration that is not required by this section.

Section 36.303 Auxiliary Aids and Services

Section 36.303 of the proposed rule requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. This requirement is based on section 302(b)(2)(A)(iii) of the ADA.

Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech. To give emphasis to this underlying obligation, § 36.303(c) of the proposed rule incorporates language derived from section 504 regulations for federally conducted programs (*see e.g.*, 28 CFR 39.160(a)) that requires that

appropriate auxiliary aids and services be furnished to ensure effective communication.

Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. Section 36.303(b) provides a list of examples of auxiliary aids and services that is taken from the definition of auxiliary aids and services in section 3(1) of the ADA and supplemented by examples from regulations implementing section 504 in federally conducted programs (*see e.g.*, 28 CFR 39.103).

The auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication. For example, a restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu. Similarly, a clothing boutique would not be required to have Brailled price tags if sales personnel provide price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication can be conducted by notepad.

A critical determination is what constitutes an effective auxiliary aid or service. While the use of notes may be effective for a person who is deaf in the context of shopping, it may not be an effective means of communication in a doctor's office when the matter to be decided is whether major surgery is necessary.

Public accommodations, though, would be well-advised, where feasible, to consult with the individual before providing him or her with a particular auxiliary aid or service. An individual may in fact require a simpler or less expensive service or device than initially envisioned by the public accommodation.

Partly because of the availability of telecommunications relay services to be established under title IV of the ADA, section 36.303(d) of the proposed rule provides that a public accommodation is not required to use a telecommunication device for the deaf (TDD) in receiving or making telephone calls incident to its operations. A public accommodation is, however, required to make a TDD available to an individual with impaired hearing or speech, if it customarily offers telephone service to its customers, clients, patients, or participants on more than an incidental convenience basis. Where entry to a place of public accommodation requires use of a security entrance telephone, a TDD or other effective means of communication

must be provided for use by an individual with impaired hearing or speech.

In other words, individual retail stores, doctors' offices, restaurants, or similar establishments are not required by this section to have TDD's, because TDD users will be able to make inquiries, appointments, or reservations with such establishments through the relay system established under title IV of the ADA. The public accommodation will likewise be able to contact TDD users through the relay system. On the other hand, hotels, hospitals, and other similar establishments that offer nondisabled individuals the opportunity to make outgoing telephone calls on more than an incidental convenience basis must provide a TDD on request.

Section 36.303(e) requires places of lodging that provide televisions in five or more guest rooms and hospitals to provide, upon request, a means for decoding closed captions for use by an individual with impaired hearing. Hotels should also provide a TDD or similar device at the front desk in order to take calls from guests who use TDD's in their rooms. In this way guests with hearing impairments can avail themselves of such hotel services as making inquiries of the front desk and ordering room service. The term "hospital" is used in its general sense and should be interpreted broadly.

Movie theaters are not required by § 36.303 to present open-captioned films. However, other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required by captioning or other means to make the information accessible to individuals with disabilities. The Department seeks comment on these requirements and examples of cost-effective ways of making these formats accessible for a variety of types of public accommodations.

The proposed rule specifies that auxiliary aids and services include the acquisition or modification of equipment or devices. For example, tape players used for an audio-guided tour of a museum exhibit may require the addition of Brailled adhesive labels to the buttons on a reasonable number of the tape players to facilitate their use by individuals who are blind. Similarly, a hotel conference center may need to provide permanent or portable assistive listening systems for persons with hearing impairments.

As provided in § 36.303(f), a public accommodation is not required to provide any particular aid or service that would result either in a fundamental alteration in the nature of

the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from existing regulations and caselaw under section 504 and are to be applied on a case-by-case basis (see, e.g., 28 CFR 39.160(d) and *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). Congress intended that "undue burden" under § 36.303 and "undue hardship," which is used in the employment provisions of title I of the ADA, should be determined on a case-by-case basis under the same standards and in light of the same factors (Judiciary report at 59). The proposed rule, therefore, in accordance with the definition of undue hardship in section 101(10) of the ADA, defines undue burden as "significant difficulty or expense" (see §§ 36.104 and 36.303(a)) and requires that undue burden be determined in light of the factors listed in § 36.306.

Consistent with regulations implementing section 504 in federally conducted programs (see, e.g., 28 CFR 39.160(d)), § 36.303(f) asserts that the fact that the provision of a particular auxiliary aid would result in an undue burden does not relieve a public accommodation from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden.

As specified in § 36.303(g), the auxiliary aids requirement does not mandate the provision of individually prescribed devices, such as prescription eyeglasses or hearing aids, or services of a personal nature including assistance in eating, toileting, or dressing, unless such personal services are customarily provided to the customers or clients of the public accommodation (e.g., a hospital or senior citizen center).

The costs of compliance with the requirements of this section may not be financed by surcharges limited to particular individuals with disabilities or any group of individuals with disabilities.

Section 36.304 Removal of Barriers

Section 36.304 requires the removal of architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense. This requirement is based on section 302(b)(2)(A)(iv) of the ADA. As stated in § 36.304(f)(1), barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation.

The statutory provision also requires the readily achievable removal of certain barriers in existing vehicles and rail passenger cars. This transportation requirement is not included in § 36.304, but rather in § 36.311(b) of the proposed rule.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, which are the subject of § 36.304, where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations (see §§ 36.401–36.406) where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction.

For example, a bank with existing automatic teller machines (ATM's) would have to remove barriers to the use of the ATM's if it is readily achievable to do so. Whether or not it is necessary to take actions such as ramping a few steps or raising or lowering an ATM would be determined by whether the actions can be accomplished easily and without much difficulty or expense.

On the other hand, a newly constructed bank with ATM's would be required by § 36.401 to have an ATM that is "readily accessible to and usable by" persons with disabilities in accordance with architectural design guidelines incorporated under § 36.406.

The requirement to remove architectural barriers includes the removal of physical barriers of any kind. For example, § 36.304 requires the removal, when readily achievable, of barriers caused by the location of temporary or movable structures, such as furniture, equipment, and display racks. In order to provide access to individuals who use wheelchairs, restaurants, for example, may need to rearrange tables and chairs and department stores may need to reconfigure display racks and shelves. As stated in § 36.304(f), such actions are not readily achievable to the extent that they result in a significant loss of selling or serving space. If the widening of all aisles in selling or serving areas is not readily achievable, then selected widening should be undertaken to maximize the amount of merchandise or the number of tables accessible to individuals who use wheelchairs. Access to goods and services provided in any remaining inaccessible areas shall be made available through

alternative methods to barrier removal, as required by § 36.305.

Section 36.304(b) provides a wide-ranging list of the types of modest measures that may be taken to remove barriers and that are likely to be readily achievable. The list includes examples of measures, such as adding raised letter markings on elevator control buttons and installing flashing alarm lights, that would be used to remove communications barriers that are structural in nature. It is not an exhaustive list, but merely an illustrative one. Moreover, the inclusion of a measure on this list does not mean that it is readily achievable in all cases. Whether or not any of these measures is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in § 36.306.

A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. The readily achievable standard does not require barrier removal that requires extensive restructuring or burdensome expense. Thus, where it is not readily achievable to do so, the ADA would not require a restaurant to provide access to a restroom reachable only by a flight of stairs.

The readily achievable defense requires a less demanding level of exertion by a public accommodation than does the undue burden defense to the auxiliary aids requirements of § 36.303. In that sense, it can be characterized as a "lower" standard than the undue burden standard. The readily achievable defense is also less demanding than the undue hardship defense in section 102(b)(5) of the ADA which limits the obligation to make reasonable accommodation in employment. Barrier removal measures that are not easily accomplishable and are not able to be carried out without much difficulty or expense are not required under the readily achievable standard, even if they do not impose an undue burden or an undue hardship.

The obligation to engage in readily achievable barrier removal is continuing one. Over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances.

Section 36.304(c) establishes priorities for public accommodations in removing barriers in existing facilities. Because the resources available for barrier removal may not be adequate to remove all existing barriers at any given time, § 36.304(c) establishes priorities for

determining which types of barriers should be mitigated or eliminated first. The purpose of these priorities is to facilitate long-term business planning and to maximize, in light of limited resources, the degree of effective access that will result from any given level of expenditure. These priorities do not expand the obligation to remove existing barriers beyond those actions that are readily achievable. Rather, they are only intended to affect the "mix" and ordering of any given set of readily achievable measures.

Section 36.304(c)(1) places the highest priority on measures that will enable individuals with disabilities to physically enter a place of public accommodation. This priority on "getting through the door" recognizes that providing actual physical access to a facility from public sidewalks and parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

When restroom facilities located in a place of public accommodation are offered for use by the public on more than an incidental basis, § 36.304(c)(2) places the next priority on measures that will provide access from the entrance of the place of public accommodation to, and within, those restroom facilities. The longer it takes to shop, or eat, or transact business at a place of public accommodation, the more important the provision of accessible restroom facilities becomes in enabling individuals with disabilities to conduct their activities on an equal basis.

Places of public accommodation, such as many convenience stores, dry cleaners, shoe repair stores, and video stores that permit public access to restrooms, if at all, only upon request, would not be subject to the priority on restroom access. On the other hand, places of public accommodation that do permit routine and open public access to restroom facilities would be subject to this priority. This distinction is based on the assumption that, in general, those places of public accommodation that provide restroom facilities only on an incidental basis are more likely to be operated in a quick in-and-out manner that renders the need for accessible restrooms less compelling.

Once one has gained entrance to a facility and has been granted appropriate access to restroom facilities, the goods and services provided by a public accommodation can generally be made available through alternative methods to barrier removal that are

required under § 36.305, if further barrier removal is not readily achievable.

The next priority, which is established in § 36.304(c)(3), is for measures that provide access to those areas of a public accommodation where goods and services are made available to the public. For example, in a hardware store, to the extent that it is readily achievable to do so, individuals with disabilities should be given access not only to assistance at the front desk, but also access, like that available to other customers, to the retail display areas of the store.

The last priority, set forth in § 36.305, is placed on any remaining measures required to remove barriers. These measures include making restrooms accessible in places of public accommodation where the public uses restrooms only on an incidental basis. The Department seeks comment on the concept of establishing priorities for the removal of barriers in existing facilities as well as on the priorities themselves.

Section 36.304(d) provides that "readily achievable" measures taken solely to remove barriers under § 36.304 are exempt from the alterations requirements of subpart D. This approach maximizes the flexibility of public accommodations in undertaking barrier removal by allowing deviations from the technical standards of subpart D. For example, slightly steeper ramps or slightly narrower doorways could be installed than those required by subpart D, access could still be provided, and resources could be released for expanding the amount of barrier removal that could be obtained under the readily achievable standard. In order to ensure that any potential safety problem is avoided, however, § 36.304(d) provides that no measure shall be taken that poses a significant risk to the health or safety of individuals with disabilities or others.

Because of the inconvenience to individuals with disabilities and the safety problems involved in the use of portable ramps, § 36.304(e) permits the use of a portable ramp to comply with § 36.304(a) only when installation of a permanent ramp is not readily achievable. In order to promote safety, § 36.304(e) requires that due consideration be given to the incorporation of features such as nonslip surfaces, railings, anchoring, and strength of materials in any portable ramp that is used.

Temporary facilities brought in for use at the site of a natural disaster are subject to the barrier removal requirements of § 36.304.

Section 36.305 Alternatives to Barrier Removal

Section 36.305 specifies that where a public accommodation can demonstrate that removal of a barrier is not readily achievable, the public accommodation must make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable. This requirement is based on section 302(b)(2)(A)(v) of the ADA.

For example, if it is not readily achievable for a retail store to raise, lower, or remove shelves or to rearrange display racks to provide accessible aisles, the store must, if readily achievable, provide a clerk or take other alternative measures to retrieve inaccessible merchandise. Similarly, if it is not readily achievable to ramp a long flight of stairs leading to the front door of a restaurant or a pharmacy, the restaurant or the pharmacy must take alternative measures, if readily achievable, such as providing curb service or home delivery. Likewise, if it is not readily achievable to remove barriers to gas pump use by individuals with manual and mobility impairments, a self-service gas station could provide refueling service, upon request, at self-service islands.

Where alternative methods are used to provide access, a public accommodation may not charge an individual with a disability for the costs associated with the alternative method. For instance, the self-service station in the example above must provide refueling service at the self-service price. Similarly, a restaurant may not charge a wheelchair user for curbside service or home delivery when these services are provided as an alternative to barrier removal.

In some circumstances, because of security considerations, some alternative methods may not be readily achievable. For example, the proposed rule does not require a service station to provide refueling service to individuals with disabilities during the hours that it is operating exclusively on a remote control basis with a single cashier. Likewise, the proposed rule does not require a cashier working in a security booth in a convenience store to leave his or her post to retrieve items for individuals with disabilities, if there are no other employees on duty.

As provided in § 36.305(c), the alternative methods requirement does not mandate the provision of personal devices, such as wheelchairs, or services of a personal nature, including

assistance in eating, toileting, or dressing.

Section 36.305(d) provides specific requirements regarding alternatives to barrier removal in multiscreen cinemas. In some situations, it may not be readily achievable to remove enough barriers to provide access to all of the theaters of a multiscreen cinema. If that is the case, § 36.305(d) requires the cinema to establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to films being presented by the cinema. It further requires that reasonable notice be provided to the public as to the location and time of accessible showings. Methods for providing notice include appropriate use of the international accessibility symbol in a cinema's print advertising and the addition of accessibility information to a cinema's recorded telephone information line.

Section 36.306 Readily Achievable and Undue Burden: Factors to be Considered

Section 36.306 lists factors to be considered in determining whether barrier removal is readily achievable in any particular circumstance or whether provision of an auxiliary aid would result in an undue burden. The list is derived from section 301(9) of the ADA. It reflects the congressional intention that a wide range of factors be considered in determining whether an action is readily achievable or an undue burden. It also takes into account that many local facilities are owned or operated by parent corporations or entities that conduct operations at many different sites. This section makes clear that it is not just the resources of the local facility where the barrier must be removed or the auxiliary aid must be provided that are relevant in determining whether an action is readily achievable or an undue burden. Nor are just the overall resources of the parent entity relevant. Rather, the resources of both the local facility and the parent entity must be considered. In determining whether a particular action is readily achievable or an undue burden, one must evaluate the degree to which the parent entity has resources that may be allocated to the local facility. In order to make this evaluation, the administrative and fiscal relationship between the parent entity and the local facility must be examined.

The statutory list of factors in section 301(9) of the Act uses the term "covered entity" to refer to the larger entity of which a particular facility may be a part. "Covered entity" is not a defined term in the ADA and is not used consistently

throughout the Act. The proposed rule, therefore, substitutes the term "parent entity" in place of covered entity in § 36.306 (c), (d), and (e) when referring to the larger private entity whose overall resources may be taken into account. This usage is consistent with the House Judiciary Committee's use of the term "parent company" to describe the larger entity of which the local facility is a part (Judiciary report at 40-41, 54-55).

Application of the "readily achievable" or "undue burden" standard should not result in the closure of any business or of any site of a multi-site business. If such closure will result, then the contemplated barrier removal, for example, is obviously not readily achievable. Many barriers can be removed, however, without threatening the economic viability of even marginally profitable businesses, and even in those cases where such a danger may occur, readily achievable alternatives to barrier removal are likely to exist.

We have declined to establish in this proposed rule any kind of numerical formula for determining whether an action is readily achievable or an undue burden. Proposals to establish such numerical standards were rejected by Congress after careful consideration. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The proposed rule, therefore, implements the flexible case-by-case approach chosen by Congress.

Section 36.307 Accessible or Special Goods

Section 36.307 establishes that the proposed rule does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities. As specified in § 36.307(c), accessible or special goods include such items as Brailled versions of books, books on audio-cassettes, closed captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not

required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

Although a public accommodation is not required by § 36.307(a) to modify its inventory, it is required by § 36.307(b), at the request of an individual with disabilities, to order accessible or special goods that it does not customarily maintain in stock if, in the normal course of its operation, it makes special orders for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business. For example, a clothing store would be required to order specially-sized clothing at the request of an individual with a disability, if it customarily makes special orders for goods that it does not keep in stock, and if the merchandise can be obtained from one of the store's customary suppliers.

Section 36.308 Seating in Assembly Areas

Section 36.308 establishes specific requirements for barrier removal in assembly areas, which include such facilities as theaters, concert halls, auditoriums, lecture halls, and conference rooms.

Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of § 36.308 will promote integration and equality in seating by requiring, where it is readily achievable, that a reasonable number of wheelchair seating spaces be provided, that the spaces be dispersed throughout the seating area with lines of sight comparable to those for all viewing areas, that the spaces adjoin an accessible emergency egress route, and that the spaces be designed to permit individuals with disabilities to be able to sit with accompanying family members or other companions.

In some cases, it may not be readily achievable to remove seats in such a manner as to enable individuals who use wheelchairs to sit next to accompanying family members or companions. In such instances, § 36.308(a)(2) requires that portable chairs be provided for the accompanying individuals.

Section 36.309 Purchase of Furniture and Equipment

Section 36.309 requires that newly purchased furniture or equipment made available for use at a place of public accommodation be accessible, to the

extent such furniture or equipment is available, unless this requirement would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations offered, or would not be readily achievable. Thus in most cases a restaurant purchasing new movable tables for its dining areas would have to ensure that a reasonable number of the tables could be used by persons in wheelchairs; i.e., there should be no crossbar or other barrier preventing a person in a wheelchair from pulling up to the table. A reasonable number of newly purchased vending machines made available by the public accommodation or a contractor should be accessible to individuals with disabilities, as should video games. If such accessible furniture or equipment is not available for purchase, a public accommodation has no obligation under this section.

The ADA requires that no individual be discriminated against on the basis of disability in the full and equal enjoyment of, among other things, the services and "facilities" of any place of public accommodation (section 302(a)). As explained under the discussion of the definition of the term in § 36.104, "facility" includes equipment and property added to indoor or outdoor areas. In addition, the committee reports refer to rearrangement of physical barriers, including those created by the arrangement of temporary or movable structures such as furniture, equipment, and display racks (Education and Labor report at 110; *see also* Judiciary report at 61-62), in the context of the requirement that physical barriers be removed if removal is readily achievable. The reports urge that consideration be given in new construction to placing fixtures and equipment to be used by employees at a convenient height for accessibility, and that if new fixtures and equipment that are adjustable are commercially available, an effort should be made to purchase them for employees. Congress clearly intended that accessibility requirements apply to furniture and equipment.

Rather than applying the new construction and alteration requirements of section 303 of the Act, which concern fixed structures (those, for example, constructed "for first occupancy" after a certain date, or altered after a certain date), the proposed rule would apply the "readily achievable" and "fundamental alteration" concepts to the purchase of accessible equipment. In addition, the rule would only require the purchase of accessible equipment if it is available in the marketplace. Thus, for example, a

health spa may be able to purchase, without much difficulty and expense, exercise equipment that can be used both by persons who are considered individuals with disabilities because of short stature and persons who do not have disabilities, or equipment with instructions that can be used by persons with vision impairments.

Section 36.310 Examinations and Courses

Section 36.310(a) sets forth the general rule that any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Paragraph (a) restates section 309 of the Americans with Disabilities Act. Section 309 is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 of the Rehabilitation Act or title II of the ADA. Any such authority that is covered by section 504, because of the receipt of Federal money, or by title II, because it is a function of a State or local government, must make all of its programs accessible to persons with disabilities, which includes physical access as well as accommodations in the way the test is administered, e.g., extended time, written instructions, or assistance of a reader.

However, many licensing, certification, and testing authorities are not covered by section 504, because no Federal money is received; nor are they covered by title II of the ADA because they are not State agencies. However, States often require the licenses provided by such authorities in order for an individual to practice a particular profession or trade. Thus, the provision was included in the ADA in order to assure that persons with disabilities are not foreclosed from educational, professional, or trade opportunities because an examination or course is conducted in an inaccessible site or without an accommodation.

As indicated in the Application section of this part (§ 36.102), § 36.310 is not limited to public accommodations or commercial facilities. Rather, the requirements of § 36.310 apply to any private entity that offers the specified types of examinations or courses. This is consistent with section 309 of the Americans with Disabilities Act, which states that the requirements apply to

"any person" offering examinations or courses.

Section 36.310(b) sets forth specific requirements for examinations. Examinations covered by this section would include a bar exam or the Scholastic Aptitude Test prepared by the Educational Testing Service. Paragraph (b)(1) is adopted from the Department of Education's section 504 regulation on admission tests to postsecondary educational programs, 34 CFR 104.42(b)(3). Paragraph (b)(1)(i) requires that a private entity offering an examination covered by the section must assure that the examination is selected and administered so as to best ensure that the examination accurately reflects an individual's aptitude or achievement level or other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). Paragraph (b)(1)(ii) requires that any examination specially designed for individuals with disabilities be offered as often and in as timely a manner as are other examinations. Paragraph (b)(1)(iii) requires that examinations be administered in facilities that are accessible to individuals with disabilities.

Paragraph (b)(2) gives examples of modifications to examinations that may be necessary in order to comply with this section. These may include providing more time for completion of the examination or a change in the manner of giving the examination, i.e., reading the examination to the individual.

Paragraph (b)(3) requires the provision of auxiliary aids unless the private entity offering the examination can demonstrate that offering a particular auxiliary aid would fundamentally alter the examination or result in an undue burden. Examples of auxiliary aids include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments or learning disabilities, and other similar services and actions. The suggestion that individuals with learning disabilities may need readers is included, although it does not appear in the Department of Education regulation, because, in fact, some individuals with learning disabilities have visual perception problems, and would benefit from a reader.

Paragraph (b)(4) gives examples of alternative accessible arrangements. For instance, the private entity might be required to provide the examination at

an individual's home with a proctor. Alternative arrangements must provide conditions for individuals with disabilities that are comparable to the conditions under which other individuals take the examinations. In other words, an examination cannot be offered to an individual with a disability in a cold, poorly lit basement, if other individuals are given the examination in a warm, well-lit classroom.

Paragraph (c) sets forth specific requirements for courses. Paragraph (c)(1) contains the general rule that any course covered by this section must be modified to ensure that the place and manner in which the course is given is accessible. Paragraph (c)(2) gives examples of possible modifications that might be required, including extending the time permitted for completion of the course (i.e., permitting oral rather than written delivery of an assignment by a person with a visual impairment), or adaptation of the manner in which the course is conducted (i.e., providing cassettes of class handouts to an individual with a visual impairment).

In language identical to that of paragraph (b), paragraph (c)(3) requires auxiliary aids unless a fundamental alteration or undue burden would result, and paragraph (c)(4) requires that courses be administered in accessible facilities. Paragraph (c)(5) gives examples of alternative accessible arrangements. These may include provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided to others, including similar lighting, room temperature, etc.

Section 36.311 Transportation Provided by Private Entities not Primarily Engaged in the Business of Transporting People

Section 36.311 contains specific provisions relating to private entities not primarily engaged in the business of transporting people but that operate specified public transportation systems. Examples of operations covered by the requirements are listed in paragraph (b)(2). They include, but are not limited to, hotel and motel airport shuttle services, customer and employee shuttle bus services operated by private companies and shopping centers, and shuttle operations of recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.

Paragraph (a)(1) states the general rule that covered private entities are subject to all of the specific provisions of subparts B and C, except as provided in § 36.311.

Paragraph (b) specifically provides that, in undertaking readily achievable actions to remove barriers in vehicles, a private entity is not required to install hydraulic or other lifts.

Paragraph (c) applies to private entities (other than over-the-road buses) operating fixed route systems.

Paragraph (c)(1) specifically applies to systems using vehicles with a seating capacity in excess of 16 passengers (including the driver). These entities must purchase or lease new vehicles for use on the fixed route systems that are readily accessible to and usable by individuals with disabilities, including individuals with wheelchairs.

Paragraph (c)(2) applies to fixed route systems using vehicles with a seating capacity of 16 passengers or less (including the driver) for which a solicitation is made after the 30th day following enactment of the Act (on or after August 26, 1990). If a private entity purchases or leases a new vehicle that is not accessible for use on such system, the entity must operate the system so that, when viewed in its entirety, the system ensures a level of service to individuals with disabilities equivalent to the level of service provided to individuals without disabilities.

Paragraph (d) applies to private entities operating demand responsive systems (other than over-the-road buses). These systems must operate, so that, when viewed in their entirety, the system ensures a level of service to individuals with disabilities equivalent to the level of service provided to individuals without disabilities.

Paragraph (d)(2) applies to systems using vehicles seating more than 16 passengers. Such vehicles must be accessible if a solicitation is made more than 30 days after the date of the enactment of the Act (on or after August 26, 1990) unless the operator's system, when viewed in its entirety, provides an equivalent level of service to individuals with and without disabilities.

Paragraph (e) applies to over-the-road buses. If a public accommodation covered by this section uses over-the-road buses in its transportation system, the buses must meet all vehicle and system requirements contained in the regulations of the Department of Transportation issued pursuant to section 306 of the Act.

Paragraph (f) states that the requirements for "private entities not primarily engaged in the business of transporting people" issued by the Department of Transportation (DOT) pursuant to section 306 of the Act (55 FR 40764) apply to vehicles and systems covered by this section. For example, the DOT regulations specify criteria for

determining whether vehicles are "readily accessible to and usable by individuals with disabilities," and whether systems ensure an "equivalent" level of service for individuals with disabilities. The ADA requires that the DOT regulations be consistent with supplemental minimum guidelines for vehicles to be issued by the Architectural and Transportation Barriers Compliance Board pursuant to section 504 of the Americans with Disabilities Act.

Subpart D—New Construction and Alterations

Subpart D implements section 303 of the Act, which requires that newly constructed or altered places of public accommodation or commercial facilities be readily accessible to and usable by individuals with disabilities. This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons and employees of places of public accommodation and employees of commercial facilities are able to get to, enter, and use the facility.

Potential patrons of places of public accommodation should be able to get to a store, get into the store, and get to the areas where goods are being provided. Employees should have the same types of access, although those individuals require access to and around the employment area as well as to the area in which goods and services are provided.

The ADA is geared to the future—its goal being that, over time, access will be the rule, rather than the exception. Thus, the Act only requires modest expenditures, of the type addressed in § 36.304 of this part, to provide access to existing facilities not otherwise being altered, but requires all new construction and alterations to be accessible.

The Act does not require new construction or alterations; it simply requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, the newly constructed or altered facility must be made accessible. This part establishes the requirements for new construction and alterations.

Section 36.401 New Construction.

Section 36.401 implements the new construction requirements of the ADA. Section 303(a)(1) of the Act provides generally that all facilities designed and constructed for first occupancy later than 30 months after the date of enactment (i.e., after January 26, 1993) must be readily accessible to and usable by individuals with disabilities.

Paragraph 36.401(a)(1) restates the general requirement for accessible new construction. Paragraph 36.401(a)(2) sets forth for comment two alternative ways by which to determine what facilities are subject to the Act and what standards apply.

The first option deems a facility to be subject to the new construction requirements if the builder files a completed application for a building permit or permit extension after January 26, 1992, and the facility is occupied after January 26, 1993. Option two, on the other hand, would impose new construction requirements if the builder files a completed application for a building permit or permit extension after the enactment of the ADA (July 26, 1990), and the facility is occupied after January 26, 1993.

Both Option One and Option Two assume that Congress did not contemplate having actual occupancy trigger the accessibility requirements, because the statute prohibits a failure to "*design and construct for first occupancy*," rather than requiring accessibility in facilities *actually* occupied after a particular date. The only other Federal statute requiring accessibility of new construction of facilities "for first occupancy" after a particular date is the Fair Housing Amendments Act of 1988 (FHAA). The regulation implementing the FHAA identifies a particular event (not actual occupancy) that occurs after a particular date, by which to determine "first occupancy." In the case of the FHAA rule, a facility for which a permit is received earlier than 14 months before the statute's "first occupancy" date, or which is actually occupied by the "first occupancy" date, is considered to be designed and constructed for first occupancy before that date. 24 CFR 100.205(a).

There are several advantages to using a date certain. First, it would be helpful for designers and builders to have a fixed date for accessible design, so that they can determine accessibility requirements early in the planning and design stage. It is difficult to determine accessibility requirements in anticipation of the actual date of first occupancy because of unpredictable and uncontrollable events (e.g., strikes affecting suppliers or labor, or natural disasters) that may delay occupancy. To redesign or reconstruct portions of a facility if it begins to appear that occupancy will be later than anticipated would be quite costly. The certification of receipt of a complete application for a building permit is an appropriate point in the process because certifications are

issued in writing by governmental authorities. This approach presents a clear and objective standard. A fixed date would also assist those responsible for enforcing, or monitoring compliance with, the statute, and those protected by it.

The Department considered using as a trigger for application of the accessibility standards, as does the FHAA rule, the date on which a permit is granted. The Department chose instead the date on which a complete permit application is certified as received by the appropriate government entity. This proposal is based on information that several months or even years can pass between application for a permit and receipt of a permit. Design is virtually complete at the time an application is complete (i.e., certified to contain all the information required by the State, county, or local government). After an application is filed, delays may occur before the permit is granted due to numerous factors (not necessarily relating to accessibility); for example, hazardous waste discovered on the property, flood plain requirements, zoning disputes, or opposition to the project from various groups. These factors should not require redesign for accessibility if the application was completed before January 26, 1992 (Option One), or July 26, 1990 (Option Two). However, if the facility must be redesigned for other reasons, such as a change in density or environmental preservation, and the final permit is based on a new application, the rule would require accessibility if the application was certified complete after January 26, 1992 (Option One), or July 26, 1990 (Option Two).

It should be noted that the dates of January 26, 1992 (Option One), and July 26, 1990 (Option Two), are relevant only with respect to the last application for a permit or permit extension for a facility. Thus, if an entity has applied for only a "foundation" permit, the date of that permit application has no effect, because the entity must also apply for and receive a permit at a later date for the actual superstructure. In this case, it is the date of the later application that would control, unless construction is not completed within the time allowed by the permit, in which case a third permit would be issued and the date of the application for that permit would be determinative for purposes of the rule.

The Department seeks comment on whether the fixed date should be the date on which a permit is received from the government agency (the approach taken in the FHAA rule), rather than the

date on which the permit application is certified complete.

Option One

Under Option One, a building would be considered to be "for first occupancy" after January 26, 1993, only (1) if the last application for a building permit or permit extension for the facility is received, and certified to be complete, by a State, county, or local government after January 26, 1992, and (2) if the first certificate of occupancy is issued after January 26, 1993.

Option One is based on the following premises relating to design, construction, and occupancy: (1) that the Act does not impose requirements on the design of buildings before the effective date of title III (January 26, 1992); and (2) that section 306(d) of the Act, concerning interim standards, has no effect until July 26, 1991, the date by which the Department of Justice must issue final regulations under title III.

In choosing the proposed date of January 26, 1992, for Option One, the Department first considered the average number of calendar days from ground breaking (which usually follows almost immediately after a permit is granted) to completion of construction, for various types of projects, as reported in the November 1988 edition of the Marshall Valuation Service (copyright 1988—Marshall and Swift). Consideration was given to adopting different dates for different sizes and types of projects (e.g., industrial facilities, which may take only 60 to 90 days to construct, as opposed to hospitals, which may take three years to construct). These data demonstrate, however, that construction times vary not only according to type of occupancy, but also according to the size of the project. Climate would also likely affect construction times from area to area of the country. Without reference to the number of facilities (information that is not available) in each of the 14 relevant categories listed in the Marshall Valuation Service, the median time from ground breaking to occupancy was approximately 14 months.

It is reasonable to expect, then, that the vast majority of buildings for which permit applications are received after January 26, 1992, will actually be occupied for the first time after January 26, 1993. According to the proposed rule, those buildings that are actually occupied by January 26, 1993, would not be subject to the new construction requirements; the Department would consider them designed for, but not constructed for, first occupancy after that date.

January 26, 1992, is also the effective date of title III's new construction

requirements. Because this Department's final rule is scheduled to be published by July 26, 1991, the date would provide covered entities with ample notice of the rule's requirements before they complete design of their facilities and file complete applications for permits.

Option Two

Option Two applies the section's requirements to all facilities for which the last application for a building permit or permit extension is completed after July 26, 1990, and for which the first certificate of occupancy is issued after January 26, 1993.

Option Two is based on the premise that the interim standards in section 306(d) take effect as of the ADA's enactment (July 26, 1990), rather than on the date by which the Department of Justice regulations are due to be issued (July 26, 1991). The initial clause of section 306(d)(1) itself is silent on this question:

If final regulations have not been issued pursuant to this section, for new construction for which a * * * building permit is obtained prior to the issuance of final regulations * * * [interim standards apply].

The approach in Option Two relies partly on the language of section 310 of the Act, which provides that section 306, the interim standards provision, takes effect on the date of enactment. Under this reading, the controlling date for imposing interim standards is the enactment date, not the date by which final regulations must be issued. This option would result in accessibility of a larger number of facilities (all those for which permits are received after enactment and occupied after January 26, 1993). Option One would not cover those for which permit applications are completed between July 26, 1990, and January 26, 1992.

The Department seeks comment on both options. The Department also seeks comment on whether Option Two should be modified to allow a "grace period" to accommodate unexpected construction delays. For example, for those facilities for which design is complete (i.e., the last permit application is certified complete) more than one year, but less than 18 months, before the end of the 30-month period, the regulation could provide that the new construction standards would not apply, if construction is completed within 18 months of the completion of the design. This approach would allow a limited exemption for some buildings that are occupied after January 26, 1993, but are certified for occupancy no later than July 26, 1993.

Regardless of whether Option One or Option Two is included in the final rule, the rule would require, as does the statute, that covered newly constructed facilities be readily accessible to and usable by individuals with disabilities. The phrase "readily accessible to and usable by individuals with disabilities" is a term that, in slightly varied formulations, has been used in the Architectural Barriers Act of 1968, the Fair Housing Act, the regulations implementing section 504 of the Rehabilitation Act of 1973, and current accessibility standards. It means, with respect to a facility or a portion of a facility, that it can be approached, entered, and used by individuals with disabilities (including mobility, sensory, and cognitive impairments) easily and conveniently. A facility that is constructed to meet the requirements of the rule's accessibility standards will be considered readily accessible and usable with respect to construction. To the extent that a particular type or element of a facility is not specifically addressed by the standards, the language of this section is the safest guide.

A private entity that renders an "accessible" building inaccessible in its operation, through policies or practices, may be in violation of section 302 of the Act. For example, a private entity can render an entrance to a facility inaccessible by requiring an individual with disabilities to obtain a key in order to operate a lift, or by keeping an accessible entrance open only during certain hours (whereas the facility is available to others for a greater length of time). A facility could similarly be rendered inaccessible if a person with disabilities is significantly limited in her or his choice of a range of accommodations.

Ensuring access to a newly constructed facility will include providing access to the facility from the street or parking lot. In some cases, the private entity will have no control over access at the point where streets, curbs, or sidewalks already exist. The private entity is responsible for providing access to the extent that it is within its own control. The private entity's obligations would extend to requesting modifications to a sidewalk, including installation of curb cuts, from a public entity responsible for them. For example, a developer would be required to attempt to secure cooperation from a locality with control over sidewalks and curb cuts. That locality would have an obligation under title II of the Act as well.

Section 36.401(b) addresses access to employment areas, rather than to the areas where goods or services are being provided. To a large extent, access within employment areas will involve issues relating to equipment, which has not generally been covered by existing accessibility standards. Section 36.401(b) provides guidance for new construction and alterations until more specific guidance is issued by the ATCB and reflected in this Department's regulations.

Section 36.401(b) requires that areas that will be used only by employees as work stations be constructed so that individuals with disabilities can approach, enter, and exit the area. It does not require that all individual work stations be constructed or equipped (for example, with shelves that are accessible or adaptable) to be accessible. This approach is based on the theory that, as long as an employee with disabilities could enter the building and get to and around the employment area, modifications in a particular work station could be instituted as a "reasonable accommodation" to that employee if the modifications were necessary and they did not constitute an undue hardship. Employers are encouraged to place fixtures and equipment at accessible heights in the first instance and to purchase new equipment and fixtures that are adjustable.

Paragraph (b)(5) of 36.401 clarifies that paragraph (b) does not limit the requirement that employee areas other than individual work stations must be accessible. For example, employee lounges and cafeterias must meet accessibility requirements.

Section 36.401(c) details a statutory exception to the new construction requirement. The requirement that new construction be accessible does not apply where an entity can demonstrate that it is structurally impracticable to meet the requirements of the regulation.

This narrow exception will apply only in rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. Such limitations for topographical problems are analogous to an acknowledged limitation in the application of the accessibility requirements of the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying that Act, the House Committee on the Judiciary noted that:

• • • certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing may traditionally be built on stilts. The Committee

does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites.

H.R. Rep. No. 711, 100th Cong., 2d Sess., at 27 (1988).

This exception means that it is acceptable to deviate from accessibility requirements only where unique characteristics of terrain prevent the incorporation of accessibility features and would destroy the physical integrity of a facility. A situation in which a building must be built on stilts because of its location in marshlands or over water is an example of one of the few situations in which the exception for structural impracticability would apply.

This exception to accessibility requirements should not be applied to situations in which a facility is located in "hilly" terrain or on a plot of land upon which there are steep grades; in such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and is required in the construction of new facilities.

In those rare circumstances in which it is structurally impracticable to achieve full compliance with accessibility requirements under the ADA, places of public accommodation and commercial facilities should still be designed and constructed to incorporate accessibility features to the extent that the features are structurally practicable. The accessibility requirements should not be viewed as an all-or-nothing proposition in such circumstances.

If it is structurally impracticable for a facility in its entirety to be readily accessible to and usable by people with disabilities, then those portions that can be made accessible should be made accessible. If a building cannot be constructed in compliance with the full range of accessibility requirements because of structural impracticability, then it should still incorporate those features that are structurally practicable. If it is structurally impracticable to make a particular facility accessible to persons who have particular types of disabilities, it is still appropriate to require it to be made accessible to persons with other types of disabilities. For example, a facility, which is of necessity built on stilts and cannot be made accessible to persons who use wheelchairs because it is structurally impracticable to do so, must be made accessible for individuals with vision or hearing impairments or other kinds of disabilities.

Section 36.401(d) implements the "elevator exemption" for new

construction in section 303(b) of the ADA: There is no requirement that an elevator be installed in facilities that are less than three stories or have less than 3000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider. For example, an office building that has only two stories, with no elevator planned, is not required to have an elevator, even if each story has 20,000 square feet. In other words, having either less than 3000 square feet per story or less than three stories qualifies a facility for the exemption; it need not qualify for the exemption on both counts. Similarly, a facility that has five stories of 2800 square feet each qualifies for the exemption. If a facility has more than two stories at any point, or more than 3000 square feet on any floor, that facility is not eligible for the elevator exemption.

The terms "shopping center or shopping mall" and "professional office of a health care provider" are defined in § 36.104. A "shopping center or shopping mall" is (1) a building housing five or more sales or rental establishments, or (2) a series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. The term "shopping center or shopping mall" only includes floor levels containing at least one sales or rental establishment, or any floor level that was designed or intended for use by at least one sales or rental establishment.

Any sales or rental establishment of the type that is included in paragraph (5) of the definition of "place of public accommodation" (for example, bakeries, grocery stores, clothing stores, and hardware stores) is considered a sales or rental establishment for purposes of this definition; the other types of public accommodations (e.g., restaurants, laundromats, banks, travel services, health spas) are not. The Department seeks comment on whether the definition of "shopping center or mall" should be expanded to include any of these other types of public accommodations. The Department also seeks comment on whether a series of buildings should fall within the definition only if they are physically connected.

For purposes of this subpart, the rule does not distinguish between a "shopping mall" (usually a roofed-over common pedestrian area serving more than one tenant within a covered mall building in which a majority of the tenants have a main entrance from a

common pedestrian area) and a "shopping center" (e.g., a "shopping strip"). Any facility housing five or more of the types of sales or rental establishments described, regardless of the number of other types of places of public accommodation housed there (e.g., offices, movie theatres, restaurants), is a shopping center or shopping mall.

For example, a two-story facility built for mixed-use occupancy on both floors, by sales and rental establishments, a movie theater, restaurants, and general office space, is a shopping center or shopping mall, if it houses five or more sales or rental establishments. If none of these establishments is located on the second floor, then only the ground floor, which contains the sales or rental establishments, would be a "shopping center or shopping mall," unless the second floor was designed or intended for use by at least one sales or rental establishment. In determining whether a floor was intended for such use, factors to be considered include the type of establishments that first occupied the floor, the nature of the developer's marketing strategy, i.e., what types of establishments were sought, and inclusion of any design features particular to rental and sales establishments.

A "professional office of a health care provider" is defined in § 36.104 as a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. In a two-story development that houses health care providers only on the ground floor, the "professional office of a health care provider" is limited to the ground floor unless the second floor was designed or intended for use by a health care provider. In determining if a floor was intended for such use, factors to be considered include whether the facility was constructed with special plumbing, electrical, or other features needed by health care providers; whether the developer marketed the facility as a medical office center; and whether any of the establishments that first occupied the floor was, in fact, a health care provider.

In addition to requiring that a building that is a shopping center, shopping mall, or the professional office of a health care provider have an elevator regardless of square footage or number of floors, the ADA (section 303(b)) provides that the Attorney General may determine that a particular category of facilities requires the installation of

elevators based on the usage of the facilities. The Department proposes to add to the nonexempt categories terminals, depots, or other stations used for specified public transportation, and airport passenger terminals. It is not uncommon for an airport passenger terminal or train station, for example, to have only two floors, with gates on both floors. Because of the significance of transportation, because a person with disabilities could be arriving or departing at any gate, and because inaccessible facilities could result in a total denial of transportation services, it is reasonable to require that newly constructed transit facilities be accessible, regardless of square footage or number of floors.

The Department requests comment on this inclusion of terminals, depots, and airport passenger terminals. Comment is also requested as to whether, and for what reason, other types of facilities should be included in the category of nonexempt facilities.

Section 36.401(d)(1) establishes the operative requirements concerning elevators, with respect to shopping centers and malls, professional offices of health care providers, transit stations, and airport passenger terminals. Under the rule's framework, it is necessary first to determine if a facility (including one or more buildings) houses places of public accommodation that are in the categories for which elevators are required. If so, and the facility is a shopping center or shopping mall, or a professional office of a health care provider, then any area housing such an office or a sales or rental establishment or the professional office of a health care provider must be on an accessible ground floor or on a floor served by an elevator. If the facility is a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal, the facility is not eligible for the elevator exemption. The following examples illustrate the application of these principles:

1. A shopping mall has an upper and a lower level. There are two "anchor stores" (in this case, major department stores at either end of the mall, both with exterior entrances and an entrance on each level from the common area). In addition, there are 30 stores (sales or rental establishments) on the upper level, all of which have entrances from a common central area. There are 30 stores on the lower level, all of which have entrances from a common central area. According to the rule, elevator access must be provided to each store and to each level of the anchor stores. This requirement could be satisfied with

respect to the 60 stores through elevators connecting the two pedestrian levels, provided that an individual could travel from the elevator to any other point on that level (i.e., into any store through a common pedestrian area) on an accessible path. In addition, if the two anchor stores are considered separate buildings from the mall, as is often the case under local or State codes, elevators must be provided within each anchor store.

2. A commercial (nonresidential) "townhouse" development is composed of 20 two-story attached buildings. The facility is developed as one project, with common ownership, and the space will be leased to retailers. Each building has one entrance from a pedestrian walk to the first floor. From that point, one can enter a store on the first floor, or walk up a flight of stairs to a store on the second floor. All 40 stores must be accessible at ground floor level or by elevator. This does not mean, however, that 20 elevators must be installed. Access could be provided to the second floor by an elevator from the pedestrian area on the lower level to an upper walkway connecting all the areas on the second floor.

3. In the same type of development, it is planned that retail stores will be housed exclusively on the ground floor, with only office space (not professional offices of health care providers) on the second. Elevator access need not be provided to the second floor because all the sales or rental establishments, the entities that make the facility a shopping center, are located on an accessible ground floor.

4. In the same type of development, the space is designed and marketed as medical or office suites, or as a medical office facility. Elevator access must be provided to all areas, as described in example 2.

Entities must not evade the requirements of this section by constructing facilities in such a way that no story constitutes a "ground floor." For example, by constructing a building whose main entrance leads only to stairways or escalators that connect with upper or lower floors; at least one ground story must be provided.

The rule requires in § 36.401(d)(2) that, even if a building falls within the elevator exemption, the floor or floors other than the ground floor that do not house a sales or rental establishment or a professional office of a health care provider must nonetheless be accessible, except for elevator access, to individuals with disabilities, including people who use wheelchairs. There is little added cost entailed in making the second floor accessible, because it is

similar in structure and floor plan to the ground floor.

There are several reasons for this provision. First, some individuals who are mobility impaired may work on a building's second floor, which they can reach by stairs and the use of crutches; however, the same individuals, once they reach the second floor, may then use a wheelchair that is kept in the office. Secondly, because the first floor will be accessible, there will be little additional cost entailed in making the second floor, with the same structure and generally the same floor plan, accessible. In addition, the second floor must be accessible to those persons with disabilities who do not need elevators for level changes (for example, persons with sight or hearing impairments and those with certain mobility impairments).

Section 36.402 Alterations

Sections 36.402-36.405 implement section 303(a)(2) of the Act, which requires that alterations to existing facilities be made in a way that ensures that the altered area is readily accessible to and usable by individuals with disabilities. This part does not require alterations; it simply provides that when alterations are undertaken, they must be made in a manner that provides access.

Section 36.402(a)(1) provides that any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Paragraph (a)(2) specifies that an alteration will be deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date.

Paragraph (b) defines an "alteration," for the purposes of this part, as a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the facility or part thereof. The concept of "usability" should be read broadly to include any change that affects the use of a facility by individuals with disabilities. It should not be limited to those that relate directly to access.

Paragraph (b)(1) elaborates on this concept by providing that changes that affect usability may include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and extraordinary repairs. Examples of alterations include: Replacing a floor or

installing a new floor; relocating an electrical outlet; installing or replacing faucet controls; relocating a furnace or replacing a heating system in a manner that requires changes to other elements of the facility; and replacing door hardware, such as door handles or hinges.

Paragraph (b)(2) explains that changes that do not affect usability include normal maintenance, reroofing, painting, wallpapering, asbestos removal, and changes to mechanical systems. Examples of specific changes that are not alterations include, but are not limited to: Replacing an accessible floor surface, e.g., carpet or linoleum, with a similar accessible floor covering; replacing an electrical outlet without changing its location; replacing faucet washers; replacing a furnace with a similar furnace in the same location; and cosmetic changes such as repairing plaster, painting, or wallpapering.

Paragraph (c) provides that the statutory phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration. In the occasional cases in which full compliance is impossible, alterations shall provide the maximum physical accessibility feasible. Any altered features of the facility or portion of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches or who have impaired vision or hearing, or those who have other types of impairments).

Section 36.403 Alterations: Path of Travel

Section 36.403 implements the statutory requirement that any alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the

overall alteration. Paragraph (a) restates this statutory requirement.

Paragraph (b) defines a "primary function" as a major activity for which the facility is intended. Areas that contain a primary function, include but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices, and all other work areas in which the activities of the public accommodation or other private entities using the facility are carried out. The concept of "areas containing a primary function" is analogous to the concept of "functional spaces" in § 3.5 of the existing Uniform Federal Accessibility Standards, which defines "functional spaces" as "[t]he rooms and spaces in a building or facility that house the major activities for which the building or facility is intended."

Paragraph (b)(2) provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and restrooms are not areas containing a primary function. There may be exceptions to this general rule. For example, the availability of public restrooms at a place of public accommodation at a roadside rest stop may be a major factor affecting customers' decisions to patronize the public accommodation. In that case, a restroom would be considered to be an "area containing a primary function" of the facility.

The Department considered an alternative approach to the definition of "primary function," under which a primary function of a commercial facility would be defined as a major activity for which the facility was intended, while a primary function of a place of public accommodation would be defined as an activity which involves providing significant goods, services, facilities, privileges, advantages, or accommodations. Areas containing a primary function of a commercial facility would include the office spaces and conference rooms in an office building; the manufacturing areas and administrative offices in a factory; or the offices and storage areas in a commercial warehouse. Areas containing a primary function of a place of public accommodation would include those areas in which customers or clients are served, but it would not include areas used only by employees of the public accommodation. For example, the sales floors of a department store would be areas containing a primary function; the offices of the store manager and the administrative staff

would not. In a bank, the bank lobby, the tellers' windows, and other customer service areas would be areas containing a primary function; the offices of bank executives, accountants, and clerical staff would not.

Although portions of the legislative history of the ADA support this alternative, the Department concluded that the better view is that the language now contained in § 36.403(b) most accurately reflects congressional intent. When the ADA was introduced, the requirement to make alterations accessible was included in section 302 of the Act, which identifies the practices that constitute discrimination by a public accommodation. Because section 302 applies only to the operation of a place of public accommodation, the alterations requirement was intended only to provide access to clients and customers of a public accommodation. It was anticipated that access would be provided to employees with disabilities under the "reasonable accommodation" requirements of title I. However, during its consideration of the ADA, the House Judiciary Committee amended the bill to move the alterations provision from section 302 to section 303, which applies to commercial facilities as well as public accommodations. The Committee report accompanying the bill explains that:

New construction and alterations of both public accommodations and commercial facilities must be made readily accessible to and usable by individuals with disabilities * * *. Essentially, [this requirement] is designed to ensure that patrons and employees of public accommodations and commercial facilities are able to get to, enter and use the facility * * *. The rationale for making new construction accessible applies with equal force to alterations. Judiciary report at 62-63 (emphasis added).

The ADA, as enacted, contains the language of section 303 as it was reported out of the Judiciary Committee. Therefore, the Department has concluded that the concept of "primary function" should be applied in the same manner to places of public accommodation and to commercial facilities, thereby including employee work areas in places of public accommodation within the scope of this section.

Paragraph (c) provides examples of alterations that affect the usability of or access to an area containing a primary function. The examples include: remodeling a merchandise display area or employee work areas in a department store; installing a new floor surface in the customer service area or employee work areas of a bank; redesigning the

assembly line area of a factory; and installing a computer center in an accounting firm. This list is illustrative, not exhaustive. Any change that affects the usability of or access to an area containing a primary function triggers the statutory obligation to make the path of travel to the altered area accessible.

Paragraph (d) defines a "path of travel" as a continuous, unobstructed way of pedestrian passage by means of which an altered area may be approached, entered, used, and exited; and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. This concept of an accessible path of travel is analogous to the concepts of "accessible route" and "circulation path" contained in section 3.5 of the current UFAS.

Paragraph (d)(2) is drawn from section 3.5 of UFAS. It provides that an accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of such elements. Paragraph (d)(3) provides that, for the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving an altered area.

Although the Act establishes an expectation that an accessible path of travel should generally be included when alterations are made to an area containing a primary function, Congress recognized that, in some circumstances, providing an accessible path of travel to an altered area may be sufficiently significant in comparison to the alteration being undertaken to the area containing a primary function as to render this requirement unreasonable. Therefore, Congress provided, in section 303(b) of the Act, that alterations to the path of travel that are disproportionate in cost and scope to the overall alteration are not required.

The Act requires the Attorney General to determine at what point the cost of providing an accessible path of travel becomes disproportionate. The proposed rule provides three options for making this determination.

Two committees of Congress specifically addressed this issue: the House Committee on Education and Labor and the House Committee on the Judiciary. The reports issued by each committee suggest that accessibility alterations to a path of travel are "disproportionate" if they exceed 30% of

the alteration costs. Education and Labor report at 113 and Judiciary report at 64. This 30% figure is presented as Option Three.

Smaller percentage rates, however, may also be appropriate. The Department, therefore, seeks comment on the use of 10% (Option One) and 20% (Option Two).

The Department has determined that the basis for this cost calculation shall be the cost of the alterations to the area containing the primary function. This will enable the public accommodation or other private entity that is making the alteration to calculate its obligation as a percentage of a clearly ascertainable base cost, rather than as a percentage of the "total" cost, an amount that will change as accessibility alterations to the path of travel are made.

Paragraph (e)(2) provides examples of costs that may be counted as expenditures required to provide an accessible path of travel. They include:

- Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

- Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucets;

- Costs associated with providing accessible telephones, such as relocating telephones to an accessible height, installing amplification devices, or installing telecommunications display devices (TDD's);

- Costs associated with relocating an inaccessible drinking fountain.

Paragraph (f)(1) provides that when the cost of alterations necessary to make the path of travel serving an altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the maximum extent feasible. Paragraph (f)(2) establishes that priority should be given to those elements that will provide the greatest access, in the following order: an accessible entrance; an accessible route to the altered area; at least one accessible restroom for each sex or a single unisex restroom; accessible telephones; accessible drinking fountains; and, whenever possible, additional accessible elements such as parking, storage, and alarms.

Paragraph (g) provides that the obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

If an area containing a primary function has been altered without providing an accessible path of travel to serve that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making the path of travel serving that area accessible is disproportionate. For the first three years after January 26, 1992, only alterations undertaken between that date and the date of the alteration at issue shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

Section 36.404 Alterations: Elevator Exemption.

Section 36.404 implements section 303(b) of the Act as it applies to altered facilities. The provisions of section 303(b) are discussed in the preamble to § 36.401(d) above. The statute applies the same requirement to both new construction and alterations. The exemption is explained in the preamble to § 36.401(d). The principal difference between the requirements of § 36.401(d) and § 36.404 is that in altering an existing facility that is not eligible for the statutory exemption, the public accommodation or other private entity responsible for the alteration is not required to install an elevator if the installation of an elevator would be disproportionate in cost and scope to the cost of the overall alteration as provided in § 36.403(e)(1).

It has been brought to the attention of the Department that there is some misunderstanding about the scope of the elevator exemption as it applies to the professional office of a health care provider. Therefore, it should be reiterated here that neither the Act nor this part requires new construction or alterations. This part does not require that an existing two story building that houses the professional office of a health care provider be altered to provide elevator access, unless the area containing the office of the health care provider is being altered, and the installation of an elevator is not disproportionate to the cost of that alteration. Neither the Act nor this part prohibits a health care provider from locating his or her professional office in an existing facility that does not have an elevator.

Like § 36.401(d), § 36.404 provides that the exemptions in this paragraph do not obviate or limit in any way the

obligation to comply with the other accessibility requirements established in this subpart. For example, alterations to floors above and below the ground floor must be accessible regardless of whether the altered facility has an elevator. If a facility that is not required to install an elevator nonetheless has an elevator, that elevator shall meet, to the maximum extent feasible, the accessibility requirements of this section.

Section 36.405 Alterations: Historic Preservation.

Section 36.405 gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize that the national interest in preserving significant historic structures warrants deference to statutory restrictions placed on alterations to historic facilities by Federal, State, and local statutes. Therefore, § 36.405(a) provides that in making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities, but § 36.405(b) provides that if it is not possible to provide physical access to an historic property that is a place of public accommodation without substantially impairing the historic features of the facility, then alternative methods of accessibility shall be provided pursuant to the requirements of subpart C of this part.

Section 36.406 Standards for New Construction and Alterations.

Section 36.406(a) implements the requirements of sections 306(b) and 306(c) of the Act, which require the Attorney General to promulgate standards for accessible design for buildings and facilities subject to the Act and this part that are consistent with the supplemental minimum guidelines and requirements for accessible design published by the Architectural and Transportation Barriers Compliance Board (ATBCB) pursuant to section 504 of the Act. Section 36.406(a) provides that new construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part.

Appendix A will be the Americans with Disabilities Act (ADA) Accessibility Guidelines published by the ATBCB as a Notice of Proposed Rulemaking, 56 FR 2296 (January 22, 1991) with any amendments made by the ATBCB during its rulemaking process. The Department proposes to adopt these

guidelines as the accessibility standard applicable under this rule. Any comments on the ATBCB's NPRM should be sent to the ATBCB at the address listed in its NPRM.

If it should appear that the ATBCB will not issue its final guidelines before the Department of Justice issues its final rule, the Department will consider issuing interim accessibility standards as part of the Department's final rule.

Section 36.406(b) will take effect only if the final rule follows the proposed Option Two for § 36.401(a). Section 36.406(b) explains that the applicable interim standard until this regulation is issued in final form will be UFAS. This paragraph is based on the language of section 306(d)(1) of the Act.

The issue of whether all these facilities are in fact covered by the rule will be resolved only when the final rule is issued. In light of this fact, the Department of Justice will consider the interim standards set out in section 306(d) to be safe harbors for new construction, until the final rule clarifies coverage. In those areas where UFAS gives incomplete guidance or conflicts with the ADA, good faith efforts at compliance are encouraged.

Subpart E—Enforcement

Because the Department of Justice does not have authority to establish procedures for judicial review and enforcement, subpart E simply restates the statutory procedures for enforcement.

Section 36.501 describes the procedures for private suits by individuals and the judicial remedies available. In addition to the language in section 308(a)(1) of the Act, paragraph 36.501(a) of this part includes the language from section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) which is incorporated by reference in the ADA. Section 308(a)(1) of the ADA permits a private suit by an individual who has reasonable grounds for believing that he or she is "about to be" subjected to discrimination in violation of section 303 of the Act (subpart D of this part), which requires that new construction and alterations be readily accessible to and usable by individuals with disabilities. Authorizing suits to prevent construction of facilities with architectural barriers will avoid the necessity of costly retrofitting that might be required if suits were not permitted until after the facilities were completed. To avoid unnecessary suits, this section requires that the individual bringing the suit have "reasonable grounds" for believing that a violation is about to occur, but does not require the individual to engage in a futile gesture if

he or she has notice that a person or organization covered by title III of the Act does not intend to comply with its provisions.

Paragraph 36.501(b) restates the provisions of section 308(a)(2) of the Act, which states that injunctive relief for the failure to remove architectural barriers in existing facilities or the failure to make new construction and alterations accessible "shall include" an order to alter these facilities to make them readily accessible to and usable by persons with disabilities to the extent required by title III. The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory" under this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess., at 64 (1990). Also, injunctive relief shall include, where appropriate, requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

Section 36.502 is based on section 308(b)(1)(A)(i) of the Act, which provides that the Attorney General shall investigate alleged violations of title III and undertake periodic reviews of compliance of covered entities. Although the Act does not establish a comprehensive administrative enforcement mechanism for investigation and resolution of all complaints received, the House Judiciary Committee noted that investigation of alleged violations and periodic compliance reviews are essential to effective enforcement of title III, and that the Attorney General is expected to engage in active enforcement and to allocate sufficient resources to carry out this responsibility. Judiciary Report at 67.

The Department recognizes the importance of providing an administrative mechanism for resolving disputes arising under the Act. Administrative resolution of complaints is far more efficient and economical than litigation, particularly in the early stages of implementation of complex litigation when the specific requirements of the statute are not widely understood. The Department expects to receive numerous complaints under this section from individuals and organizations. To the extent feasible, the Department will investigate complaints, issue findings related to any violations found, and attempt to obtain voluntary compliance. Where appropriate, the Department will also use information obtained under this section as a basis for litigation activities under section 308(b)(1)(B) of the Act.

Section 36.503 describes the procedures for suits by the Attorney General set out in section 308(b)(1)(B) of the Act. If the Department has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

Section 36.504 describes the relief that may be granted in a suit by the Attorney General under section 308(b)(2) of the Act. In such an action, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III. In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding \$50,000 for a first violation and not exceeding \$100,000 for any subsequent violation. Section 36.504(b) of this proposed rule adopts the standard of section 308(b)(3) of the Act. This section makes it clear that, in counting the number of previous determinations of violations for determining whether a "first" or "subsequent" violation has occurred, determinations in the same trial on liability that the entity has engaged in more than one discriminatory act are to be counted as a single violation. A "second violation" would not accrue to that public accommodation until the Attorney General brought another suit against the accommodation and the accommodation was again held in violation. Again, all of the violations on the second suit would be cumulatively considered as a "subsequent violation."

Section 36.504(c) of the proposed rule clarifies that the terms "monetary damages" and "other relief" do not include punitive damages. They do include, however, all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering.

Section 36.504(a)(3) of the proposed rule is based on section 308(b)(2)(C) of

the Act, which provides that, "to vindicate the public interest," a court may assess a civil penalty against the entity that has been found to be in violation of the Act in suits brought by the Attorney General. In addition section 36.504(d), which is taken from section 308(b)(5) of the Act, further provides that, in considering what amount of civil penalty, if any, is appropriate, the court should give consideration to "any good faith effort or attempt to comply with this Act." In evaluating such good faith, the court should consider "among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

The "good faith" standard referred to in this section is not intended to imply a willful or intentional standard—that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the existence of good faith.

Section 36.505 states that courts are authorized to award attorneys fees, as provided in section 505 of the Act.

Section 36.506 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

Section 36.507 explains that, as provided in section 506(e) of the Act, a public accommodation or other private entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

Section 36.508 Effective Date

In general, title III is effective 18 months from enactment of the Americans with Disabilities Act, i.e., January 26, 1992. However, there are several exceptions to this general rule contained throughout title III. Section 36.508 sets forth all of these exceptions in one place.

Paragraph (b) contains the rule on civil actions. It states that, except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of \$1,000,000 or less; and before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of \$500,000 or less. In determining what constitutes gross receipts, it is appropriate to exclude amounts collected for sales taxes.

Paragraph (c) concerns transportation services provided by public accommodations not primarily engaged in the business of transporting people. The 18-month effective date applies to all of the transportation provisions except those requiring newly purchased or leased vehicles (other than over-the-road buses) to be accessible. Vehicles subject to that requirement must be accessible to and usable by individuals with disabilities if the solicitation for the vehicle is made on or after August 26, 1990.

Subpart F—Certification of State Laws or Local Building Codes

Subpart F establishes procedures to implement section 308(b)(1)(A)(ii) of the Act, which provides that, on the application of a State or local government, the Attorney General may certify that a State law or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements.

The first step in the certification process would be a request for certification, filed by a "submitting official," which is defined in § 36.601 as the State or local official who has principal responsibility for administration of a State law or local building code or similar ordinance that establishes accessibility requirements, and who files a request for certification under subpart F. The request would be filed in duplicate with the office of the Assistant Attorney General for Civil Rights. The submitting official must supply the following documents: (1) The text of the code; any standards, regulation, etc., incorporated by reference or otherwise referenced in the code; the law creating the requesting agency; any formal opinions of the State Attorney General or other legal officer; (2) any model code or statute on which the code is based, and an explanation of the differences between them; (3) anything else pertinent. The Assistant Attorney General may request further information. The request and supporting materials would be available for public examination at the office of the Assistant Attorney General and at the office of the State or local agency charged with administration and enforcement of the code. The submitting official must publish public notice of the request for certification.

Next, under § 36.604, the Assistant Attorney General's office would consult with the ATBCB and make a preliminary determination to either (1)

find that the code is equivalent (make a "preliminary determination of equivalency") or (2) deny certification. The next step depends on which of these preliminary determinations is made.

If the preliminary determination is to find equivalency, the Assistant Attorney General, under § 36.605, would inform the submitting official in writing of the preliminary determination and publish a notice in the *Federal Register* informing the public of the preliminary determination and inviting comment for 30 days. After considering the information received in response to the comments, the Department would hold an *informal hearing* in Washington. This hearing would not be subject to the formal requirements of the Administrative Procedure Act. After the hearing, the submitting official would have 30 days to submit other information. The Assistant Attorney General's office would consult again with the ATBCB and make a final determination of equivalency or a final determination to deny the request for certification, with a notice of the determination published in the *Federal Register*.

If the preliminary determination is to deny certification, there would be no hearing. The Department would notify the submitting official of the preliminary determination, and may specify how the code could be modified in order to receive a preliminary determination of equivalency. The Department would allow at least 15 days for the submitting official to submit relevant material in opposition to the preliminary denial. If none were received, no further action would be taken. If more information were received, the Department would consider it and make either a final decision to deny certification or a preliminary determination of equivalency. If at that stage the Assistant Attorney General made a preliminary determination of equivalency, the hearing procedures set out in § 36.605 would be followed.

Section 36.607 addresses the effect of certification. First, certification would only be effective concerning those features or elements that are both (1) covered by the certified code and (2) addressed by the regulations against which they are being certified. For example, if children's facilities are not addressed by the Department's standards, and the building in question is a private elementary school, certification would not be effective for those features of the building to be used by children. And if the Department's regulations addressed equipment but the local code did not, a building's

equipment would not be covered by the certification.

In addition, certification would be effective only for the particular edition of the code that is certified. Amendments would not automatically be considered certified, and a submitting official would need to reapply for certification of the changed or additional provisions. We request comment on whether a streamlined process might be used for considering the changes.

Regulatory Process Matters

This notice of proposed rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12291. The Department has prepared a regulatory impact analysis (RIA) of this rule, and the Architectural and Transportation Barriers Compliance Board has prepared an RIA for the guidelines that will be included at Appendix A of the Department's final rule. The Department will provide copies of these documents to the public on request.

The Department's RIA evaluates the economic impact of the proposed rule. Included among those title III provisions that are likely to result in significant economic impact are the requirements for auxiliary aids, barrier removal in existing facilities, and readily accessible new construction and alterations. An analysis of the costs of these provisions is included in the RIA.

Each of the title III requirements noted above necessitates different types of compliance measures. In order to estimate with a high degree of accuracy the total social costs associated with these measures, comprehensive information is needed concerning the characteristics of the operations and the facilities of the more than 3.8 million covered entities. The proposed rule's requirements are highly entity-specific, and for any particular entity would depend upon what measures would "fundamentally alter" the operations of that entity, would impose an "undue burden" upon it in light of its financial and other capabilities, would be "readily achievable" by it, or would be "structurally impracticable" for it to accomplish. Consequently, there likely will be substantial variation in costs from one entity to the next. The Department would welcome any information that would assist in accurately estimating the impacts of the proposed rule's highly entity-specific compliance standards or other data useful in estimating the average impact per entity. This information would enable the Department to develop an improved aggregate cost estimate.

Commenters are encouraged to provide empirical data or existing analyses that may shed light on costs related to the provision of auxiliary aids, barrier removal, new construction, and alterations in specific types of businesses. The Department is also interested in receiving comment on the indirect costs of these requirements, for example, the loss of display space resulting from wider aisles, or the cost of alternative security measures where turnstiles have been removed.

The Department also requests comment concerning the extent to which each entity has already taken steps—either voluntarily or pursuant to State, local or other Federal law—to make its operations and facilities accessible to persons with disabilities and to what extent those steps have resulted in compliance with the ADA. Finally, the Department seeks comment on the costs of potential litigation under the ADA as well as costs incurred by covered entities that, out of fear of litigation, take steps beyond those required by the law.

Estimation of the proposed rule's benefits is equally difficult. The RIA contains some data concerning the demographic characteristics of individuals with disabilities, including the number of persons with each type of disability, and the extent to which each type of disability results in reduced access to public accommodations. However, in order to estimate benefits accurately, more data of this kind is needed, as well as information concerning the extent to which barriers to access will be mitigated or eliminated through ADA compliance measures. In addition, detailed information is needed concerning the demand for public accommodations for each relatively homogenous class of persons with disabilities, as well as concerning the marginal costs of supply. The generally recognized measure of valuation for such benefits—the willingness-to-pay-for-them that would be exhibited in a market setting (net of the marginal cost of their production)—is not revealed merely by information concerning the prices charged for compliance measures, but should be obtained through an analysis of demand curve-based consumer surplus measures.

The Department encourages the submission of any data that would assist in estimating the benefits of the proposed rule. In addition, the Department would welcome comment concerning the extent to which various classes of disabled persons are likely, as a result of the title III rule, to utilize to an increased extent the products and

services of various classes of covered entities, and concerning the extent to which the prices paid for these products and services are accurate proxies for the consumer surplus and producer surplus generated by their utilization.

The Department has determined that this proposed rule will not have a significant economic impact on a substantial number of small business entities. Therefore, it is not subject to the Regulatory Flexibility Act. The Department is nonetheless interested in receiving empirical data regarding the costs and benefits of this proposed rule with respect to small entities.

This proposed rule will preempt State laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. Therefore, this proposed rule is not subject to Executive Order 12612, and a Federalism Assessment is not required.

The reporting and recordkeeping requirements described in subpart F of the proposed rule are considered to be information collection requirements as that term is defined by the Office of Management and Budget in 5 CFR part 1320. Accordingly, those proposed information collection requirements are being submitted to OMB for review pursuant to the Paperwork Reduction Act. Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503. Attention: Desk Officer for the Department of Justice. The Department requests that comments sent to OMB also be sent to the rulemaking docket for this proposed action, at the address given in the "ADDRESSES" section of this notice.

List of Subjects in 28 CFR Part 36

Administrative practice and procedure, Alcoholism, Americans with disabilities, Buildings, Business and industry, Civil rights, Consumer protection, Drug abuse, Handicapped, Historic preservation, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by 28 U.S.C. 509, 510, 5 U.S.C. 301, and section 306(b) of the Americans with Disabilities Act, Pub. L. 101-336, and for the reasons set forth in the preamble, chapter I of title 28 of the Code of Federal Regulations is proposed to be amended by adding a new part 36 to read as follows:

Part 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Subpart A—General

Sec.

- 36.101 Purpose.
- 36.102 Application.
- 36.103 Relationship to other laws.
- 36.104 Definitions.
- 36.105–36.200 [Reserved]

Subpart B—General Requirements

- 36.201 General.
- 36.202 Activities.
- 36.203 Integrated settings.
- 36.204 Administrative methods.
- 36.205 Association.
- 36.206 Retaliation or coercion.
- 36.207 Places of public accommodations located in private residences.
- 36.208 Direct threat.
- 36.209 Illegal use of drugs.
- 36.210 Smoking.
- 36.211 Maintenance of accessible features.
- 36.212 Insurance.
- 36.213 Relationship of subpart B to subparts C and D of this part.
- 36.214–36.300 [Reserved]

Subpart C—Specific Requirements

- 36.301 Eligibility criteria.
- 36.302 Modifications in policies, practices, or procedures.
- 36.303 Auxiliary aids and services.
- 36.304 Removal of barriers.
- 36.305 Alternatives to barrier removal.
- 36.306 Readily achievable and undue burden: Factors to be considered.
- 36.307 Accessible or special goods.
- 36.308 Seating in assembly areas.
- 36.309 Purchase of furniture and equipment.
- 36.310 Examinations and courses.
- 36.311 Transportation provided by private entities not primarily engaged in the business of transporting people.
- 36.312–36.400 [Reserved]

Subpart D—New Construction and Alterations

- 36.401 New construction.
- 36.402 Alterations.
- 36.403 Alterations: Path of travel.
- 36.404 Alterations: Elevator exemption.
- 36.405 Alterations: Historic preservation.
- 36.406 Standards for new construction and alterations.
- 36.407–36.500 [Reserved]

Subpart E—Enforcement

- 36.501 Private suits.
- 36.502 Administrative enforcement.
- 36.503 Suit by the Attorney General.
- 36.504 Relief.
- 36.505 Attorneys fees.
- 36.506 Alternative means of dispute resolution.
- 36.507 Effect of unavailability of technical assistance.
- 36.508 Effective date.
- 36.509–36.600 [Reserved]

Subpart F—Certification of State Laws or Local Building Codes

- 36.601 Definitions.
- 36.602 General rule.
- 36.603 Filing a request for certification.
- 36.604 Preliminary determination.

36.605 Procedure following preliminary determination of equivalency.

36.606 Procedure following preliminary denial of certification.

36.607 Effect of certification.

36.608–36.999 [Reserved]

Appendix A to Part 36—Standards for Accessible Design

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Pub. L. 101–336 (42 U.S.C. 12166).

Subpart A—General

§ 36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

§ 36.102 Application.

(a) *General.* This part applies to any—

- (1) Public accommodation;
- (2) Commercial facility; or
- (3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

(b) *Public accommodations.* (1) The requirements of this part applicable to public accommodations are set forth in subparts B, C, and D of this part.

(2) The requirements of subparts B and C of this part obligate a public accommodation only with respect to the operations of a place of public accommodation.

(3) The requirements of subpart D of this part obligate a public accommodation only with respect to—

(i) A facility used as, or designed or constructed for use as, a place of public accommodation; or

(ii) A facility used as, or designed and constructed for use as, a commercial facility.

(c) *Commercial facilities.* The requirements of this part applicable to commercial facilities are set forth in subpart D of this part.

(d) *Examinations and courses.* The requirements of this part applicable to private entities that offer examinations or courses as specified in paragraph (a) of this section are set forth in § 36.310.

(e) *Exemptions and exclusions.* This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.

§ 36.103 Relationship to other laws.

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to that title.

(b) *Section 504.* This part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by federal agencies implementing section 504.

(c) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

§ 36.104 Definitions.

For purposes of this part, the term—
Act means the Americans with Disabilities Act of 1990 (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Commerce means travel, trade, traffic, commerce, transportation, or communication—

(1) Among the several States;

(2) Between any foreign country or any territory or possession and any State; or

(3) Between points in the same State but through another State or foreign country.

Commercial facilities means facilities—

(1) Whose operations will affect commerce;

(2) That are intended for nonresidential use by a private entity; and

(3) That are not—

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601-3631);

(ii) Aircraft; or

(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Disability means, with respect to an individual, a permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1) The phrase *physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction, and alcoholism.

(iv) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a private entity as having such an impairment.

(5) The term *disability* does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the private entity acts on the basis of such use.

Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories—

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service,

shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

Private entity means a person or entity other than a public entity.

Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The term "professional office of a health care provider" only includes floor levels containing at least one or more health care providers, or any floor level designed or intended for use by at least one health care provider.

Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable factors to be considered include—

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and

resources, or the impact otherwise of the action upon the operation of the site;

(3) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(4) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(5) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

Religious entity means a religious organization or entity controlled by a religious organization, including a place of worship.

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Shopping center or shopping mall means—

(1) A building housing five or more sales or rental establishments; or

(2) A series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this definition, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in this section are considered sales or rental establishments. The term "shopping center or shopping mall" only includes floor levels containing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Undue burden means significant difficulty or expense. In determining

whether an action would result in an undue burden, factors to be considered include—

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources, or the impact otherwise of the action upon the operation of the site;

(3) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(4) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(5) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

§§ 36.105-36.200 [Reserved]

Subpart B—General Requirements

§ 36.201 General.

(a) *Prohibition of discrimination.* No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) *Landlord and tenant responsibilities*—(1) *General.* Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to this part.

(2) *Responsibility for taking readily achievable measures to remove barriers.* (i) Unless provided otherwise by contract, the landlord is responsible for making readily achievable changes in common areas or modifying policies, practices, or procedures applicable to all tenants to achieve compliance with this part.

(ii) If the lease or other contractual agreement gives the tenant the right to make alterations within the place of public accommodation with permission of the landlord—

(A) The tenant is responsible for requesting permission for any readily achievable modification required by this part.

(B) If permission is granted by the landlord, the tenant is responsible for

making the required readily achievable modification.

(C) If permission is granted by the landlord but the modification necessary for access is not readily achievable for the tenant, then the landlord is responsible for making the needed modification within the public accommodation if it is readily achievable for the landlord to do so.

(iii) If the lease reserves authority for making alterations solely to the landlord or if the landlord withholds the permission requested by the tenant pursuant to paragraph (b)(2)(ii)(A) of this section, then the landlord is responsible for making any readily achievable modifications required by this part.

(iv) *Illustration.* If an office building contains a doctor's office, the tenant who operates the doctor's office would be required to make readily achievable modifications within the office (unless the contractual agreement provided otherwise), and the landlord would be required to make readily achievable modifications to the primary entrance of the building and other common areas.

(3) *Responsibility for providing auxiliary aids*—(i) *General.* The tenant is responsible for providing auxiliary aids (Braille notices, interpreters, etc.) within the place of public accommodation and the landlord is responsible for providing auxiliary aids in common areas.

(ii) *Illustration.* If an office building contains a lawyer's office, the tenant who operates the lawyer's office would be required to provide auxiliary aids within the office. However, the landlord would also be responsible for ensuring that the doorman or guard will show a person who is blind to the elevator or write a note to a person who is deaf regarding the floor number of the lawyer's office, if requested to do so.

(4) *Alterations.* If a tenant is making alterations under § 36.402 that would trigger the § 36.403 path of travel requirement, those alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered.

§ 35.202 Activities.

(a) *Denial of participation.* A public accommodation shall not subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods,

services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(b) *Participation in unequal benefit.* A public accommodation shall not afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(c) *Separate benefit.* A public accommodation shall not provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(d) *Individual or class of individuals.* For purposes of paragraphs (a) through (c) of this section, the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

§ 36.203 Integrated settings.

(a) *General.* A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(b) *Opportunity to participate.* Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different.

(c) *Accommodations and services.* Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that such individual chooses not to accept.

§ 36.204 Administrative methods.

A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration

that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

§ 36.205 Association.

A public accommodation shall not exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

§ 36.206 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(c) Illustrations of conduct prohibited by this section include, but are not limited to:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual with disabilities who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

§ 36.207 Places of public accommodation located in private residences.

When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion

used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part.

§ 36.208 Direct threat.

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(c) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

§ 36.209 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public accommodation shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.* A public accommodation shall not deny health services or services provided in connection with drug rehabilitation to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(c) *Drug testing.* (1) This part does not prohibit a public accommodation from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to

ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in this paragraph (c) shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 36.210 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in places of public accommodation.

§ 36.211 Maintenance of accessible features.

A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

§ 36.212 Insurance.

(a) This part shall not be construed to prohibit or restrict—

(1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) Paragraphs (a) (1), (2), and (3) of this section shall not be used as a subterfuge to evade the purposes of the Act or this part.

(b) A public accommodation shall not refuse to serve an individual with a disability because its insurance company conditions coverage or rates on the absence of individuals with disabilities.

§ 36.213 Relationship of subpart B to subparts C and D of this part.

Subpart B of this part sets forth the general principles of nondiscrimination applicable to all entities subject to this part. Subparts C and D of this part provide guidance on the application of the statute to specific situations. The specific provisions, including the

limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply.

§ 36.214–36.300 [Reserved]

Subpart C—Specific Requirements

§ 36.301 Eligibility criteria.

(a) *General.* A public accommodation shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

(b) *Safety.* A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(c) *Charges.* A public accommodation may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

§ 36.302 Modifications in policies, practices, or procedures.

(a) *General.* A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(b) *Specialties.*—(1) *General.* A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public

accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

(2) Illustration—medical specialties.

A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

(c) Service animals—(1) Areas open to the general public. A public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public.

(2) Areas not open to the general public. In areas not open to the general public, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. If the modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or provided by the public accommodation, or if the policies, practices, or procedures are necessary for safe operation, the use of a service animal may be denied.

(3) Care or supervision of service animals. Nothing in this part requires a public accommodation to supervise or care for a service animal.

§ 36.303 Auxiliary aids and services.

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) Examples. The term "auxiliary aids and services" includes—

(1) Qualified interpreters, notetakers, written materials, telephone handset amplifiers, assistive listening devices,

assistive listening systems, telephones compatible with hearing aids, television decoders, telecommunication devices for deaf persons (TDD's), or other effective methods of making orally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(c) Effective communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

(d) Telecommunication devices for the deaf (TDD's). (1) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder.

(2) This part does not require a public accommodation to use a TDD for receiving or making telephone calls incident to its operations.

(e) Closed caption decoders. Places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use shall provide, upon request, a means for decoding captions for use by an individual with impaired hearing.

(f) Alternatives. If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in such an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.

(g) Personal devices and services. This section does not require a public accommodation to provide its customers, clients, or participants with individually prescribed devices, such as prescription eyeglasses or hearing aids, or with services of a personal nature

including assistance in eating, toileting, or dressing.

§ 36.304 Removal of barriers.

(a) *General.* A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) *Examples.* Examples of steps to remove barriers include, but are not limited to, the following actions—

- (1) Installing ramps;
- (2) Making curb cuts in sidewalks and entrances;
- (3) Lowering shelves;
- (4) Rearranging tables, chairs, vending machines, display racks, and other furniture;
- (5) Lowering telephones;
- (6) Adding raised letter markings on elevator control buttons;
- (7) Installing flashing alarm lights;
- (8) Widening doors;
- (9) Installing offset hinges to widen doorways;
- (10) Eliminating a turnstile or providing an alternative accessible path;
- (11) Installing accessible door hardware;
- (12) Installing grab bars in toilet stalls;
- (13) Rearranging toilet partitions to increase maneuvering space;
- (14) Insulating lavatory pipes;
- (15) Installing a raised toilet seat;
- (16) Installing a full-length bathroom mirror;
- (17) Lowering the paper towel dispenser in a bathroom;
- (18) Creating a designated accessible parking space;
- (19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- (20) Removing high pile, low density carpeting; or
- (21) Modifying vehicle hand controls.

(c) *Priorities.* A public accommodation shall take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.

(1) First, a public accommodation shall take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation shall take measures to provide access to restroom facilities in places of public accommodation where restroom facilities are used by the public on more

than an incidental basis. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(3) Third, a public accommodation shall take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, widening doors, and installing ramps.

(4) Fourth, a public accommodation shall take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(d) *Relationship to alterations requirements of subpart D of this part.* Measures taken solely to comply with the barrier removal requirements of this section are not required to conform to the requirements for alterations in §§ 36.402–36.406. These measures include, for example, installing a ramp with a steeper slope or widening a doorway to a narrower width than that required by § 36.406. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) *Portable ramps.* Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) *Interpretation of “readily achievable.”* (1) Barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation.

(2) The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

§ 36.305 Alternatives to barrier removal.

(a) *General.* Where a public accommodation can demonstrate that barrier removal is not readily achievable, a public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through

alternative methods, if those methods are readily achievable.

(b) *Examples.* Examples of alternatives to barrier removal include, but are not limited to, the following actions—

(1) Providing curb service or home delivery;

(2) Retrieving merchandise from inaccessible shelves or racks;

(3) Relocating activities to accessible locations;

(4) Providing refueling service at inaccessible self-service gas stations.

(c) *Personal devices and services.*

This section does not require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs, or services of a personal nature including assistance in eating, toileting, or dressing.

(d) *Multiscreen cinemas.* If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

§ 36.306 Readily achievable and undue burden: Factors to be considered.

In determining whether an action is readily achievable or would result in an undue burden, factors to be considered include—

(a) The nature and cost of the action needed under this part;

(b) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources, or the impact otherwise of the action upon the operation of the site;

(c) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(d) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(e) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

§ 36.307 Accessible or special goods.

(a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that

are designed for, or facilitate use by, individuals with disabilities.

(b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities, if, in the normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.

(c) Examples of accessible or special goods include items such as Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

§ 36.309 Seating in assembly areas.

(a) *Existing facilities.* (1) To the extent that it is readily achievable, a public accommodation shall—

(i) Provide a reasonable number of wheelchair seating spaces in assembly areas; and

(ii) Locate the wheelchair seating spaces so that they—

(A) Are dispersed throughout the seating area;

(B) Provide lines of sight comparable to those for all viewing areas;

(C) Adjoin an accessible route that also services as a means of egress in case of emergency;

(D) Permit individuals who use wheelchairs to sit with family members or other companions.

(2) If removal of seats is not readily achievable, a public accommodation shall provide a portable chair or other means to permit a family member or other companion to sit with an individual who uses a wheelchair.

(b) *New construction and alterations.*

The provision and location of wheelchair seating spaces in newly constructed or altered assembly areas shall be governed by the appropriate requirements and standards for new construction and alterations specified in subpart D (§§ 39.401–36.406 of this part).

§ 36.309 Purchase of furniture and equipment.

A public accommodation that makes available for use tables, vending machines, exercise equipment, video games, or other furniture or equipment at a place of public accommodation, directly or through contractual or other arrangements, shall ensure that a reasonable number of the items of newly purchased furniture or equipment that it provides are accessible to and usable by individuals with disabilities, unless—

(a) The public accommodation can demonstrate that providing such furniture or equipment would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered; or

(b) Providing such accessible furniture or equipment is not readily achievable.

§ 36.310 Examinations and courses.

(a) *General.* Any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

(b) *Examinations.* (1) Any private entity offering an examination covered by this section must assure that—

(i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure);

(ii) An examination that is designed for individuals with impaired sensory, manual, or speaking skills is offered as often and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the examination or would result in an undue burden. Auxiliary aids required by this section may include taped examinations, interpreters or other effective methods

of making orally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments or learning disabilities, and other similar services and actions.

(4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

(c) *Courses.* (1) Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to ensure that the place and manner in which the course is given are accessible to individuals with disabilities.

(2) Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted.

(3) A private entity that offers a course covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that person can demonstrate that offering a particular auxiliary aid would fundamentally alter the course or would result in an undue burden. Auxiliary aids required by this section may include taped texts, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments and learning disabilities, classroom equipment adapted for use by individuals with manual impairments, and other similar services and actions.

(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made.

(5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

§ 36.311 Transportation provided by private entities not primarily engaged in the business of transporting people.

(a) *General.* (1) A public accommodation that provides specified public transportation services, but that is not primarily engaged in the business of transporting people, is subject to the

general and specific provisions in subparts B and C of this part for its transportation operations, except as provided in this section.

(2) Illustrations of public accommodations that provide transportation services, but that are not primarily engaged in the business of transporting people, include hotel and motel airport shuttle services, customer and employee shuttle bus services operated by private companies and shopping centers, and shuttle operations of recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.

(b) *Barrier removal.* A public accommodation covered by this section shall remove transportation barriers in existing vehicles and rail passenger cars used for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) where such removal is readily achievable.

(c) *Fixed route systems (other than over-the-road buses)*—(1) *Accessibility.* Newly purchased or leased vehicles with a seating capacity in excess of 16 passengers (including the driver) for use in fixed route systems, for which a solicitation is made on or after August 26, 1990, must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) *Equivalent service.* Newly purchased or leased vehicles with a seating capacity of 16 passengers or less (including the driver) must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the fixed route system is operated so that, when viewed in its entirety, the system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(d) *Demand responsive systems (other than over-the-road buses)*—(1) *Operation of system.* A public accommodation covered by this section that operates a demand responsive transportation system shall operate this system so that, when viewed in its entirety, this system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(2) *Vehicles.* Newly purchased or leased vehicles with a seating capacity in excess of 16 passengers (including the driver) for use in demand responsive

systems, for which a solicitation is made on or after August 26, 1990, must be readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless the public accommodation can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(e) *Over-the-road buses.* If a public accommodation covered by this section uses over-the-road buses in its transportation system, the buses must meet all vehicle and system requirements contained in the regulations of the Department of Transportation issued pursuant to section 306 of the Act.

(f) *Applicable standards.* The requirements for "private entities not primarily engaged in the business of transporting people" issued by the Department of Transportation pursuant to section 306 of the Act (49 CFR part 37) shall apply to vehicles and systems covered by this section.

§ 36.312-36.400 [Reserved]

Subpart D—New Construction and Alterations

§ 36.401 New construction.

(a) *General.* (1) Except as provided in paragraphs (c) and (d) of this section, any public accommodation or other private entity responsible for design and construction of a place of public accommodation or commercial facility designed and constructed for first occupancy after January 26, 1993, shall ensure that the facility is designed and constructed to be readily accessible to and usable by individuals with disabilities.

OPTION ONE FOR PARAGRAPH (a)(2)

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only—

(i) If the last application for a building permit or permit extension for the facility is received, and certified to be complete, by a State, County, or local government after January 26, 1992, and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

OPTION TWO FOR PARAGRAPH

(a)(2)

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only—

(i) If the last application for a building permit or permit extension for the facility is received, and certified to be complete, by a State, County, or local government after July 26, 1990; and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

(b) *Areas used only by employees as work stations.* (1) In order to meet the requirements of this section, the public accommodation or other private entity responsible for design and construction shall ensure that areas that may be used by employees with disabilities are designed and constructed so that individuals with disabilities can approach, enter, and exit the areas.

(2) This paragraph does not require that all individual workstations be constructed or equipped (for example, with counters or shelves) to be accessible.

(3) The public accommodation or other private entity responsible for design and construction shall give consideration to placing fixtures and equipment at a convenient height for accessibility when these fixtures and equipment are used by both employees and the general public.

(4) For fixtures and equipment that will be used only by employees, the public accommodation or other private entity responsible for design and construction shall give consideration to the purchase and installation of commercially available fixtures and equipment that are adjustable so that future attempts to make reasonable accommodations to employees who will use the facility will not pose undue hardships.

(5) The requirements set forth in this paragraph do not obviate or limit in any way the requirement that other areas, besides those used only by employees as work stations, be accessible. For example, public use and common use areas must be accessible to the extent specified by the standards in § 36.406. Areas intended for general use by employees but not by the public (e.g., restrooms; employee lounges; employee cafeterias, gyms, and health facilities) must be accessible.

(c) *Exception for structural impracticability.* (1) A public accommodation or other private entity is not required to meet fully the requirements of this section where that public accommodation or other private entity can demonstrate that it is structurally impracticable to do so. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(2) If full compliance with this section would be structurally impracticable, the public accommodation or other private entity shall comply with the requirements of this section to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(3) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, the public accommodation or other private entity shall nonetheless ensure that the facility is accessible to persons with other types of disabilities (e.g., those who use crutches or who have sight, hearing, or mental impairments).

(d) *Elevator exemption.* (1) This section does not require the installation of an elevator in a facility that is less than three stories or has less than 3000 square feet per story, except with respect to any facility that houses one or more of the following:

(i) A shopping center or shopping mall, or a professional office of a health care provider. In such a facility, any area housing a sales or rental establishment or a professional office of a health care provider must be on an accessible ground floor or on a floor served by an elevator.

(ii) A terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. Such a facility is not eligible for the elevator exemption set forth in this paragraph.

(2) The elevator exemption set forth in this paragraph does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in paragraph (a) of this section. For example, in a facility that houses a shopping center or shopping mall, or a professional office of a health care provider, the floors above or below the accessible ground floor that do not house sales or rental establishments or a professional office of a health care provider must meet the requirements of this section but for the elevator.

(3) If a building is subject to the elevator exemption set forth in this paragraph, but the building nonetheless has an elevator or will be designed and constructed with an elevator, that elevator shall meet the requirements of this section.

§ 36.402 Alterations.

(a) *General.* (1) Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that,

to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) An alteration is deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date.

(b) *Affecting usability.* For the purposes of this part, an alteration is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the facility or any part of the facility.

(1) Changes that affect usability include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and extraordinary repairs. Examples of alterations that must comply with the standards established by § 36.406 include:

(i) Replacing a floor, or installing a new floor;

(ii) Relocating an electrical outlet;

(iii) Installing or replacing faucet controls;

(iv) Relocating a furnace or replacing a heating system in a manner that requires changes to other elements of the facility; and

(v) Replacing door hardware, such as door handles or hinges.

(2) Changes that do not affect usability include: normal maintenance, reroofing, painting, wallpapering, asbestos removal, or changes to mechanical systems. Examples of specific changes that are not alterations include, but are not limited to:

(i) Replacing an accessible floor surface, e.g., carpet or linoleum, with a similar accessible floor covering;

(ii) Replacing an electrical outlet without changing its location;

(iii) Replacing faucet washers;

(iv) Replacing a furnace with a similar furnace in the same location; and

(v) Cosmetic changes such as repairing plaster, painting, or wallpapering.

(c) *To the maximum extent feasible.*

The phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility or portion of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this

section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

§ 36.403 Alterations: Path of travel.

(a) *General.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(b) *Primary function.*—(1) *General.* A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function, include but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out.

(2) *Exclusion.* Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and restrooms are not areas containing a primary function.

(c) *Usability of or access to an area containing a primary function.*

Alterations that affect the usability of or access to an area containing a primary function include, but are not limited to—

(1) Remodeling merchandise display areas or employee work areas in a department store;

(2) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank;

(3) Redesigning the assembly line area of a factory; or

(4) Installing a computer center in an accounting firm.

(d) *Path of travel.* (1) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(2) An accessible path of travel may consist of walks and sidewalks, curb

ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(3) For the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

OPTION ONE FOR PARAGRAPH (e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 10% of the cost of the alteration to the primary function area.

OPTION TWO FOR PARAGRAPH

(e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.

OPTION THREE FOR PARAGRAPH

(e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 30% of the cost of the alteration to the primary function area.

(2) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(i) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(ii) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(iii) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications display device (TDD);

(iv) Costs associated with relocating an inaccessible drinking fountain.

(f) *Duty to provide accessible features in the event of disproportionality.* (1)

When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, then the path of travel shall be made accessible to the maximum extent feasible.

(2) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

(i) An accessible entrance;

(ii) An accessible route to the altered area;

(iii) At least one accessible restroom for each sex or a single unisex restroom;

(iv) Accessible telephones;

(v) Accessible drinking fountains; and
(vi) When possible, additional accessible elements such as parking, storage, and alarms.

(g) *Series of smaller alterations.* (1) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(2)(i) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(ii) For the first three years after January 26, 1992, only alterations undertaken between the effective date and the date of the alteration at issue shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

§ 36.404 Alterations: Elevator exemption.

(a) This section does not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story, except with respect to any facility that houses a shopping center, a shopping mall, the professional office of a health care provider, a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal.

(b) The exemption provided in paragraph (a) of this section does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in this subpart. For example, alterations to floors above or below the accessible ground floor must be accessible regardless of whether the altered facility has an elevator.

§ 36.405 Alterations: Historic Preservation.

(a) In making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities.

(b) If it is not possible to provide physical access to a historic property that is a place of public accommodation without substantially impairing the historic features of the facility, alternative methods of accessibility shall be provided pursuant to the requirements of subpart C of this part.

§ 36.406 Standards for new construction and alterations.

(a) New construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part.

ADD PARAGRAPH (b) IF OPTION TWO FOR PARAGRAPH (a)(2) OF § 36.401 IS ADOPTED.

(b) A facility subject to this section, and for which construction is authorized by a valid and appropriate State or local building permit obtained before [INSERT DATE ON WHICH THE FINAL REGULATION IS PUBLISHED IN THE FEDERAL REGISTER], and for which the construction begins within one year of the receipt of the permit and is completed under the terms of such permit, shall be deemed to satisfy the requirements of this section if the facility was constructed in compliance with the Uniform Federal Accessibility Standards (Appendix A to 41 CFR part 101-19, subpart 101-19.6) in effect at the time the building permit was issued.

§§ 36.407 36.500 [Reserved]

Subpart E—Enforcement

§ 36.501 Private suits.

(a) *General.* Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public importance. Nothing in this section shall require a person with a disability to engage in a futile gesture if

the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.

(b) *Injunctive relief.* In the case of violations of § 36.304, § 36.401, and § 36.402 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.

§ 36.502 Administrative enforcement.

(a) The Attorney General shall investigate alleged violations of the Act or this part, and shall undertake periodic reviews of compliance of public accommodations or other private entities covered by this part.

(b) Any individual who believes that he or she or a specific class of persons has been subjected to discrimination prohibited by the Act or this part may request the Department to institute an investigation.

§ 36.503 Suit by the Attorney General.

The Attorney General or his or her designee may commence a civil action in any appropriate United States district court if the Attorney General or his or her designee has reasonable cause to believe that—

(a) Any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or

(b) Any person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.

§ 36.504 Relief.

(a) *Authority of court.* In a civil action under section 36.503, the court—

(1) May grant any equitable relief that such court considers to be appropriate, including, to the extent required by the Act or this part—

(i) Granting temporary, preliminary, or permanent relief;

(ii) Providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) Making facilities readily accessible to and usable by individuals with disabilities;

(2) May award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved

when requested by the Attorney General or his or her designee; and

(3) May, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) Not exceeding \$50,000 for a first violation; and

(ii) Not exceeding \$100,000 for any subsequent violation.

(b) *Single violation.* For purposes of paragraph (a)(3) of this section, in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(c) *Punitive damages.* For purposes of paragraph (a)(2) of this section, the terms “monetary damages” and “such other relief” do not include punitive damages.

(d) *Judicial consideration.* In a civil action under § 36.503, the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this part by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

§ 36.505 Attorneys fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 36.506 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 36.507 Effect of unavailability of technical assistance.

A public accommodation or other private entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or

dissemination of any technical assistance manual authorized by the Act.

§ 36.508 Effective date.

(a) *General.* Except as otherwise provided in this section and in this part, this part shall become effective on January 26, 1992.

(b) *Civil actions.* Except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs—

(1) Before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of \$1,000,000 or less.

(2) Before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of \$500,000 or less.

(c) *Transportation services provided by private entities not primarily engaged in the business of transporting people.* Newly purchased or leased vehicles (other than over-the-road buses) required to be accessible by § 36.311 must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the solicitation for the vehicle is made on or after August 26, 1990.

§§ 36.509–36.600 [Reserved]

Subpart F—Certification of State Laws or Local Building Codes

§ 36.601 Definitions.

For purposes of this subpart—

Assistant Attorney General means the Assistant Attorney General for Civil Rights or his or her designee.

Certification of equivalency means a final certification that a code meets or exceeds the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Code means a State law or local building code or similar ordinance that establishes accessibility requirements.

Preliminary determination of equivalency means a preliminary determination that a code appears to meet or exceed the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Submitting official means the State or local official who—

(1) Has principal responsibility for administration of a code; and

(2) Files a request for certification under this subpart.

§ 36.602 General rule.

On the application of a State or local government, the Assistant Attorney General may certify that a code meets or exceeds the minimum requirements of

the Act for the accessibility and usability of places of public accommodation and commercial facilities under this part by issuing a certification of equivalency. At any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

§ 36.603 Filing a request for certification.

(a) A submitting official may file a request for certification of a code under this subpart.

(b) The submitting official shall include the following materials and information in support of the request:

(1) The text of the jurisdiction's code; any standard, regulation, code, or other document incorporated by reference or otherwise referenced in the code; the law creating and empowering the agency; and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the code;

(2) Any model code or statute on which the pertinent code is based, and an explanation of any differences between the model and the pertinent code; and

(3) Any additional information that the submitting official may wish to be considered.

(c) The submitting official shall file the original and one copy of the request and of supporting materials with the Assistant Attorney General. The submitting official shall clearly label the request as a "request for certification" of a code. A copy of the request and supporting materials will be available for public examination and copying at the offices of the Assistant Attorney General in Washington, DC. The submitting official shall ensure that copies of the request and supporting materials are available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code. The submitting official shall ensure that adequate public notice of the request for certification and of the location at which the request and materials can be inspected is published within the relevant jurisdiction.

(d) Upon receipt of a request for certification, the Assistant Attorney General may request further information that he or she considers relevant to the determinations required to be made under this subpart.

§ 36.604 Preliminary determination.

After consultation with the Architectural and Transportation Barriers Compliance Board, the

Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

§ 36.605 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.604, he or she shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General shall also—

(1) Publish a notice in the Federal Register that advises the public of the preliminary determination of equivalency with respect to the particular code, and invite interested persons and organizations, including individuals with disabilities, during a period of at least 30 days following publication of the notice, to file written comments relevant to whether a final certification of equivalency should be issued;

(2) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the Federal Register, hold an informal hearing in Washington, DC, at which interested persons, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

(3) Provide an opportunity for the submitting official to submit written or oral information to the Assistant Attorney General within 30 days after the close of the hearing.

(b) The Assistant Attorney General, after consultation with the Architectural and Transportation Barriers Compliance Board, and consideration of the materials and information submitted pursuant to this section and § 36.603, shall issue either a certification of equivalency or a final determination to deny the request for certification. He or she shall publish notice of the certification of equivalency or denial of certification in the Federal Register.

§ 36.606 Procedure following preliminary denial of certification.

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under § 36.604, he or she shall notify the submitting official of the determination. The notification may include specification of the manner in which the code could be amended in order to qualify for certification.

(b) The Assistant Attorney General shall allow the submitting official not

less than 15 days to submit data, views, and arguments in opposition to the preliminary determination to deny certification. If the submitting official does not submit materials, the Assistant Attorney General shall not be required to take any further action. If the submitting official submits materials, the Assistant Attorney General shall evaluate those materials and any other relevant information. After evaluation of any newly submitted materials, the Assistant Attorney General shall make either a final denial of certification or a preliminary determination of equivalency.

§ 36.607 Effect of certification.

(a) (1) A certification shall be considered a certification of equivalency only with respect to those features or elements that are both covered by the certified code and addressed by the standards against which equivalency is measured.

(2) For example, if certain equipment is not covered by the code, the determination of equivalency cannot be used as evidence with respect to the question of whether equipment in a building built according to the code satisfies the Act's requirements with respect to equipment. By the same token, certification would not be relevant to construction of a facility for children, if the regulations against which equivalency is measured do not address children's facilities.

(b) A certification of equivalency is effective only with respect to the particular edition of the code for which certification is granted. Any amendments or other changes to the code after the date of the certified edition are not considered part of the certification.

(c) A submitting official may reapply for certification of amendments or other changes to a code that has already received certification.

§§ 36.606–36.999 [Reserved]

Appendix A to Part 36—Standards for Accessible Design

[Copies of this appendix may be obtained from the Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, DC 20035–6118.]

Dated: February 12, 1991.

Dick Thornburgh,
Attorney General.

[FR Doc. 91–3755 Filed 2–21–91; 8:45 am]

BILLING CODE 4410–01–M

**ARCHITECTURAL AND
TRANSPORTATION BARRIERS
COMPLIANCE BOARD**

36 CFR Part 1191

[Docket No. 90-2]

RIN 3014-AA09

**Americans With Disabilities Act (ADA)
Accessibility Guidelines for Buildings
and Facilities**

AGENCY: Architectural and
Transportation Barriers Compliance
Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board is issuing proposed guidelines to provide guidance to the Department of Justice in establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities, as required by the Americans with Disabilities Act (ADA) of 1990. The guidelines will ensure that newly constructed and altered buildings and facilities are readily accessible to and usable by individuals with disabilities in terms of architecture and design, and communication. The standards established by the Department of Justice cannot be consistent with and may incorporate the guidelines.

DATES: Comments should be received by March 25, 1991. Comments received after this date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to the Office of the General Counsel, Architectural and Transportation Barriers Compliance Board, 1111 18th Street, NW., suite 501, Washington, DC 20036. Comments will be available for inspection at this address from 9 a.m. to 5:30 p.m. on regular business days.

FOR FURTHER INFORMATION CONTACT: James Raggio, Office of the General Counsel, Architectural and Transportation Barriers Compliance Board, 1111-18th Street, NW., suite 501, Washington, DC 20036. Telephone (202) 653-7834 (Voice/TDD). This is not a toll-free number. This document is available in accessible formats (cassette tape, braille, large print, or computer disc) upon request.

SUPPLEMENTARY INFORMATION:

Background

The Americans With Disabilities Act (ADA) of 1990 extends to individuals with disabilities comprehensive civil rights protections similar to those provided to persons on the basis of race,

sex, national origin, and religion under the Civil Rights Act of 1964. Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. As discussed below, title III establishes accessibility requirements for new construction and alterations in places of public accommodation and commercial facilities.

"Public accommodation" is defined by section 301(7) of the ADA as including the following twelve categories of private entities if their operations affect commerce:

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

The legislative history states that these twelve categories "should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities." H. Rept. 101-485, pt. 2, at 100.

"Commercial facilities" are defined by section 301(1) of the ADA as facilities that are intended for nonresidential use and whose operations will affect commerce. The legislative history states that the term is to be interpreted broadly to cover commercial establishments that are not included within the specific definition of "public accommodation" such as office buildings, factories, and other places in which employment will occur. H. Rept. 101-485, pt. 2, at 116-17.

Section 303 of the ADA establishes accessibility requirements for new construction and alterations in places of public accommodation and commercial facilities. With respect to new construction, section 303(a)(1) requires that places of public accommodation and commercial facilities designed or constructed for first occupancy after January 26, 1993 (30 months after the date of enactment of the ADA), must be readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable. When alterations are made that affect or could affect usability of a place of public accommodation or commercial facility, section 303(a)(2) requires that the alterations be made in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities. In addition, where alterations affect or could affect usability of or access to an area of the facility containing a primary function, section 303(a)(2) requires that the alterations be made in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities to the extent that these additional accessibility features are not disproportionate to the overall alterations in terms of cost and scope, as determined under criteria established by the Attorney General.

Section 303(b) of the ADA contains an exception which specifies that the installation of an elevator is not required for newly constructed or altered facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, shopping mall, the professional office of a health care provider, or another type of facility determined by the Attorney General to require the installation of an elevator based on the usage of the facility.

According to the legislative history, the term "readily accessible to and

usable by" is intended to provide "a high degree of convenient accessibility" and "enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and use a facility." H. Rept. 101-485, pt. 2, at 117-18. The term includes "accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services, programs, facilities, accommodations and work areas available at the facility." *Id.* The legislative history further explains that when identical features will generally serve the same function, only a reasonable number should be accessible depending on such factors as their use, location, and number; however, when identical features will generally be used in different ways, each one should be accessible in most situations. H. Rept. 101-485, pt. 2, at 118; H. Rept. 101-485, pt. 3, at 61. For example, only a reasonable number of spaces in a parking lot or stalls within a restroom would have to be accessible, but all meeting rooms at a conference center would have to be accessible because each one may be used for different purposes at any given time. *Id.* The legislative history contains additional examples of features which would have to be accessible at specific facilities, including banks, hotels, physicians' offices, and supermarkets. *Id.*

Title III of the ADA becomes effective on January 26, 1992. Under section 306(b) of the ADA, the Department of Justice is responsible for issuing final regulations by July 26, 1991, that include accessibility standards for newly constructed and altered places of public accommodation and commercial facilities. Section 504 of the ADA requires that the Architectural and Transportation Barriers Compliance Board issue guidelines by April 26, 1991, to provide guidance to the Department of Justice in establishing the standards. Section 306(c) of the ADA provides that the Department of Justice's standards must be consistent with the Board's guidelines. According to the legislative history, the Department of Justice's standards may incorporate the Board's guidelines. H. Rept. 101-485, pt. 2, at 119.

The Board is an independent Federal agency established pursuant to section 502 of the Rehabilitation Act of 1973 to ensure that the requirements of the Architectural Barriers Act of 1968 are met and to propose alternative solutions to architectural, transportation, communication, and attitudinal barriers

faced by individuals with disabilities.¹ The Board has developed guidelines to provide guidance to the four Federal agencies (the General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the United States Postal Service) responsible for establishing accessibility standards for those federally owned, leased, or financed buildings covered by the Architectural Barriers Act of 1968. Those guidelines are called the Minimum Guidelines and Requirements for Accessible Design (MGRAD) and are published at 36 CFR part 1190. The standards established by the four Federal agencies are called the Uniform Federal Accessibility Standards (UFAS) and were published in the Federal Register on August 7, 1984 (49 FR 31528).² UFAS is generally consistent with MGRAD.

Section 504 of the ADA requires that the guidelines issued by the Board under the ADA supplement the existing MGRAD and "establish additional requirements, consistent with this Act, to ensure that buildings [and] facilities * * * are accessible in terms of architecture and design * * * and communication, to individuals with disabilities."³ The legislative history further explains that the guidelines may not "reduce, weaken, narrow or set less accessibility standards than those included in existing MGRAD" and should provide greater guidance in the area of communication accessibility for individuals with hearing and visual impairments. H. Rept. 101-485, pt. 2, at 139. Section 504 of the ADA also requires that the guidelines include provisions based on UFAS for alterations to qualified historic properties.

On August 31, 1990, the Board published an advance notice of proposed rulemaking (ANPRM) seeking comments from the public on the format for the guidelines to be issued under the

ADA (55 FR 35856). As explained in the ANPRM, MGRAD includes technical specifications which describe how to make entrances, telephones, drinking fountains, toilet rooms, and other elements and spaces of a building or facility accessible; and scoping provisions which specify the extent to which the technical specifications must be followed (how many, when, and where accessible elements and spaces must be provided in a facility). Throughout the development of its guidelines, the Board has used the 1980 and 1986 versions of the American National Standard Institute's ANSI A117.1 standard as the basis for the technical specifications.⁴ The ANSI A117.1 standard is developed through a consensus process by a committee made up of over 50 organizations representing associations of individuals with disabilities, rehabilitation professionals, designers, builders, manufacturers, and government agencies. The ANSI A117.1 standard has been generally accepted by the private sector, and has been incorporated or referenced in the model building codes. Two-thirds of the States currently incorporate or reference the 1980 or 1986 versions of the ANSI A117.1 standard, or other documents such as the model building codes of UFAS which are based on those standards, in their building codes.

The ANPRM reviewed the different formats utilized by MGRAD and UFAS, and proposed three possible options for the guidelines to be issued under the ADA:

Option 1. Use the ANSI format and numbering system and reprint the text and illustrations of the ANSI A117.1 standard, with modifications and additions noted by italics or other means, similar to what is done in UFAS.

Option 2. Use the Federal Register format and numbering system and incorporate by reference the ANSI A117.1 standard, with modifications and additions listed under an "exceptions" section, similar to what is done in the 1982 version of MGRAD.

Option 3. Use the Federal Register format and numbering system and reorganize the text and illustrations of the ANSI A117.1 standard, similar to

¹ The Board consists of 12 members appointed by the President from among the general public, at least six of whom are required to be individuals with disabilities, and the heads of 11 Federal agencies or their designees (Executive Level IV or above). The Federal agencies are: the Departments of Health and Human Services, Education, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, and Veterans Affairs; General Services Administration; and United States Postal Service.

² The General Services Administration and the Department of Housing and Urban Development have respectively published UFAS as an appendix to 41 CFR part 101, subpart 101-19.5 and 24 CFR part 40.

³ Section 504 of the ADA also requires the Board to issue accessibility guidelines for transportation vehicles. Those guidelines will appear in a separate notice of proposed rulemaking.

⁴ American National Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped People (ANSI A117.1-1980); American National Standard for Buildings and Facilities—Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1-1986). The ANSI A117.1 standard contains only technical specifications. Government bodies which use the ANSI A117.1 standard must develop their own scoping provisions.

what was done in the 1982 version of MGRAD.

Comments were requested on which option would promote greatest ease of use by the public, especially if the standards established by the Department of Justice incorporate the Board's guidelines. A total of 59 comments were received from organizations representing individuals with disabilities, State agencies responsible for accessibility, building code groups, businesses, architects, schools of architecture, and various other government agencies and individuals. Forty-eight (48) commenters, the overwhelming majority, preferred Option 1 (i.e., using the ANSI format and numbering system and reprinting the text and illustrations of the A117.1 standard, with modifications and additions noted by italics or other means, similar to what is done in UFAS).⁵ The most frequently stated reason for using Option 1 was to have all scoping provisions and technical specifications readily available in a single document without the need to reference other documents. Commenters who preferred Option 1 also noted that it would promote consistency with State and local building codes and facilitate voluntary certification of those codes by the Attorney General under section 308(b)(1)(A)(ii) of the ADA.⁶ Three model code groups and two businesses preferred Option 2, and generally observed that the incorporation by reference approach has been used satisfactorily in the building codes.⁷ Two commenters preferred Option 3. Four commenters did not specify a preference for any format.

The model code groups also recommended that the Board rely on the

ANSI process for making revisions to the ANSI A117.1 standard and adopt the proposed scoping provisions under development by the Council of American Building Officials' Board for the Coordination of Model Codes (BCMC) for the ANSI A117.1 standard. The ANSI A117.1 standard is reviewed at five year intervals and is presently in the process of being revised by the ANSI A117 Committee. The Board is a member of the ANSI A117 Committee and has actively participated in the revision process. A proposed draft ANSI A117.1-1991 is expected to be issued in early 1991; however the final version is not expected to be approved in time for the Board to review for purposes of issuing these guidelines. Nonetheless, the Board has considered the planned revisions to the ANSI A117.1 standard when proposing revisions to the technical specifications. For instance, changes are proposed to the technical specifications for alarms, detectable warnings, and signage to provide greater guidance with respect to communication accessibility. The proposed changes are generally consistent with the planned revisions to the ANSI A117.1 standard. See, sections 4.28, 4.29 and 4.30 for additional discussion. With respect to the proposed BCMC scoping provisions, in some areas they are consistent with the ADA requirements and in other areas they are not. Where other scoping provisions are consistent with the ADA requirements, the Board has considered and will continue to consider them in the course of developing these guidelines.

Based on the comments received in response to the ANPRM, the Board has decided to use the ANSI format and numbering system and reprint the text and illustrations of ANSI A117.1 standard, with modifications and additions noted by italics. This is the format followed by UFAS. Since the substantive requirements of UFAS are generally consistent with MGRAD, and because UFAS was written so as to be incorporated as accessibility standards in regulations issued by other Federal agencies, the Board has used UFAS as the model for these proposed guidelines.⁸ Where UFAS establishes a

⁵ Those preferring Option 1 include: American Hotel and Motel Association; American Society of Interior Designers; Marriott Corporation; National Association of Theater Owners; National Restaurant Association; Alaska Department of Transportation and Public Facilities; Hawaii Commission on Persons with Disabilities; New York State Office of Advocate for the Disabled; Oregon Building Officials Association; Texas State Purchasing and General Services Commission; Washington Association of Building Officials; American Council of the Blind; Disability Rights Education and Defense Fund, Inc.; National Council on Independent Living; and Paralyzed Veterans of America.

⁶ Section 308(b)(1)(A)(ii) of the ADA provides that on application of a State or local government, the Attorney General may, in consultation with the Board, and after prior notice and a public hearing, certify that a State or local building code meets or exceeds the accessibility requirements of the ADA.

⁷ Option 2 was preferred by the Building Officials and Code Administrators (BOCA) International; Council of American Building Officials (CABO); Southern Building Code Congress International (SBCCI); National Elevator Industry; and Schindler Elevator Corporation.

⁸ Section 308(d)(1) of the ADA provides for UFAS to serve as the interim accessibility standard for the ADA under certain circumstances. The section states in relevant part that:

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal

lesser requirement than an existing MGRAD requirement, the MGRAD requirement has been used. For instance, UFAS does not address windows but MGRAD does; and therefore the MGRAD requirement is used. See, § 4.12. To distinguish these proposed guidelines from MGRAD and UFAS, the Board proposes to call them the "ADA Accessibility Guidelines for Buildings and Facilities" (hereinafter referred to as the "ADA Guidelines").

Although the proposed ADA guidelines are modeled on UFAS, the ADA establishes different requirements in some areas. For example, as discussed above, title III of the ADA requires certain additional accessibility features to be provided where alterations "affect or could affect usability of or access to an area of a facility containing a primary function" to the extent they are "not disproportionate" to the overall alterations in terms of cost and scope. UFAS requires certain additional accessibility features to be provided where a substantial alteration occurs. See, § 4.1.6(2) for additional discussion. Title III of the ADA includes an exception for "structural impracticability" in new construction. UFAS includes an exception for "structural impracticability" in alterations. See, § 4.1.1(5) for additional discussion. Title III of the ADA does not require an elevator in newly constructed or altered facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a certain type of facility. UFAS does not contain such an exception. See, § 4.1.3(5) for additional discussion.

In reviewing the legislative history of the ADA, the Board has also found some areas where a requirement that differs from UFAS is suggested. For example, the Conference Report states that "every newly constructed facility subject to the Act shall have at least one ground story that is readily accessible to and usable by individuals with disabilities." H. Rept. 101-596, at 77. UFAS requires at least one principal entrance at each grade (ground) floor level to a building or facility to be accessible. See, § 4.1.3(8) for additional discussion. The House Education and Labor Committee Report states that a percentage of examining rooms in physicians' offices should be accessible. H. Rept. 101-485, pt. 2, at 118. UFAS requires with respect to physicians' offices that all areas for

which the intended use will require public access or which may result in employment of persons with disabilities must be accessible. See, § 4.1.1(3) for additional discussion. Although the reports of the House Education and Labor Committee and the House Judiciary Committee generally recognize that the extent to which identical features should be accessible depends on whether they will be used in different ways, the former report but not the latter states that "all check-out lanes in a supermarket should be sufficiently wide to allow passage by individuals who use wheelchairs." Compare, H. Rept. 101-485, pt. 2, at 118 and H. Rept. 101-485, pt. 3, at 61. UFAS requires at least one check-out aisle to be accessible. See, § 7.3 for additional discussion. The Board has attempted to reconcile these differences in a reasonable way consistent with the statute.

Consistent with the mandate of Section 504 of the ADA, the Board proposes to provide greater guidance than UFAS in the area of communication accessibility. The scoping provisions for new construction contain additional requirements for telecommunication display devices or telecommunication devices for the deaf (TDDs), volume control telephones, and assistive listening systems for individuals with hearing and other communication impairments. Improved technical specifications for alarms, detectable warnings, and signage are also proposed which are generally consistent with planned revisions to the ANSI A117.1 standard.

The proposed ADA guidelines also contain special application sections similar to UFAS for certain types of facilities. Special application sections are proposed for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. The Board is developing a special application section for transportation facilities covered by titles II and III of the ADA which it intends to issue as a supplemental notice of proposed rulemaking (SNPRM) to these guidelines. Section 10 of the guidelines is reserved for this purpose. The SNPRM will make these guidelines applicable to both public and private transportation facilities covered by titles II and III of the ADA. Accordingly, public and private transportation providers, as well as other interested parties, are encouraged to comment on this notice of proposed rulemaking in the context of how the guidelines will affect transportation facilities.

Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities. . . .

The Board also intends through a subsequent notice of proposed rulemaking to include State and local government buildings covered by title II of the ADA in these guidelines and encourages State and local government agencies, as well as other interested parties, to comment on this notice of proposed rulemaking in the context of how the guidelines will affect those buildings. Many newly constructed or altered State and local government buildings are designed or altered consistent with UFAS under current regulations issued under section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance. However, the ADA requirements for newly constructed and altered State and local government buildings differ in some aspects from those for places of public accommodation and commercial facilities. For example, the exception for structural impracticability in new construction and the elevator exception for newly constructed and altered facilities that are less than three stories or have less than 3,000 square feet per story do not apply to State and local government buildings. The Board has identified other areas where different requirements for State and local government buildings may be appropriate. These issues are further discussed under Other Issues.

Summary of Proposed Guidelines

The proposed ADA guidelines are issued as an appendix to 36 CFR part 1191. As discussed above, the proposed guidelines use UFAS as their model; follow the ANSI format and numbering system; and are consistent with the existing MGRAD. The proposed guidelines consist of nine main sections and a separate appendix. Sections one through three contain general provisions and definitions. Section four contains scoping provisions and technical specifications applicable to all covered buildings and facilities. The scoping provisions are listed separately for new construction of sites and exterior facilities; new construction; additions; alterations; and alterations to qualified historic properties. The technical specifications reprint the text and illustrations of the ANSI A117.1 standard with differences noted by italics. Sections five through nine of the guidelines are special application sections and contain additional requirements for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. The appendix to the guidelines contains

additional information to aid in understanding the technical specifications. The section numbers in the appendix correspond to the sections of the technical specifications to which they relate. An asterisk after a technical specification section number indicates that additional information appears in the appendix.

Each section is further discussed below. If a section differs from UFAS, it is discussed in greater detail. In some areas, the Board is considering varying from UFAS but seeks information and comment from the public before taking further action. Wherever possible, the Board seeks empirical data regarding the benefits and costs of each alternative.

1. Purpose

This section states that the document sets guidelines for accessibility to places of public accommodation and commercial facilities. The guidelines are to be applied to the design, construction, and alteration of such buildings and facilities to the extent required by title III of the ADA. The Board intends through subsequent notices of proposed rulemaking to include State and local government buildings and transportation facilities covered by title II of the ADA in the guidelines. Accordingly, State and local government agencies and providers of transportation services, as well as other interested parties, are encouraged to comment on this notice of proposed rulemaking in the context of how the proposed guidelines will affect State and local government buildings and transportation facilities.

2. General

2.1 Provisions for Adults

This section states that the technical specifications in the guidelines are based upon adult dimensions and anthropometrics.

Title III of the ADA covers day care centers and nursery, elementary, secondary, undergraduate, and postgraduate private schools. The Board believes that the technical specifications in the guidelines are adequate for secondary, undergraduate and postgraduate schools, but are not appropriate for facilities used by younger children. In 1985, the Board, in cooperation with the Department of Education, developed "Recommendations for Accessibility to Serve Physically Handicapped Children in Elementary Schools." This document was developed following a review of research and existing guidelines for children's environments. The Board's

MGRAD/UFAS Review Project completed in 1989 recommended that the Board conduct a formal research project to review and improve these recommendations and to incorporate children's accessibility requirements as part of MGRAD. A Board sponsored project on "Accessibility Standards for Children's Environments" is currently underway. After the completion of this project in late summer of 1991, the Board anticipates supplementing these guidelines for children's environments.

Question 1: * To assist the Board and its contractor, the Board seeks any information relevant to requirements for children. Additionally, since the requirements should likely differ for very small children, and there is a lack of any known information on this topic, the Board is particularly interested in information and technical studies relating to preschool aged children.

2.2 Equivalent Facilitation

This section permits departures from particular scoping provisions and technical specifications by use of other methods where the alternative methods used will provide substantially equivalent or greater access to and usability of the facility. As explained in the legislative history, "[a]llowing these departures will provide public accommodations and commercial facilities with necessary flexibility to design for special circumstances and will facilitate the application of new technologies." H. Rept. 101-485, pt. 2, at 119.

The section requires that the alternative methods provide "substantially" equivalent or greater access, in order to clarify that the alternative access need not be precisely equivalent to that afforded by the guidelines. Application of the "substantially" equivalent access language will depend on the nature, location, and intended use of a particular building. Generally, alternative methods will satisfy the requirement if in material respects the access is substantially equivalent to that which would be provided by the guidelines in such respects as ease, safety, convenience, and independence of movement. For example, it would be permissible to depart from the technical specifications of § 4.10.9 that the inside dimensions of an elevator car be at least 68 inches or 80 inches (depending on the

location of the door) on the door opening side, by 54 inches, if the clear floor area and the configuration of the car permits wheelchair users to enter the car, make a 360 degree turn, maneuver within reach of controls, and exit from the car. This departure is permissible because it results in access that is easy, safe, convenient, and independent, and therefore substantially equivalent to that provided by guidelines.

3. Miscellaneous Instructions and Definitions

3.1 Graphic Conventions

3.2 Dimensional Tolerances

3.3 Notes

3.4 General Terminology

These sections are taken directly from UFAS and are consistent with the ANSI A117.1 standard. They provide general instructions relating to graphic conventions, dimensional tolerances, the appendix to the guidelines, and terminology.

3.5 Definitions

With a few exceptions discussed below, the definitions in this section are taken from UFAS and are similar to the definitions used in the ANSI A117.1 standard. In some instances, the definitions are clarified or elaborated. Most of the terms and definitions are discussed as they appear in the scoping provisions. See, §§ 4.1.1 through 4.1.7.

The definition of facility is drawn from the legislative history and includes all or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site. H. Rept. No. 101-485, pt. 2, at 114. With respect to equipment, these guidelines address equipment that is fixed or built into a facility and is considered part of the design and construction of the building or facility. Such equipment includes fixed or built-in tables, counters, desks, storage, bookshelves, and other furnishings. Automated teller machines in banks are also covered. Movable equipment and furnishings are expected to be addressed in regulations issued by the Department of Justice.

The term "building" has been defined to mean any structure used or intended for supporting or sheltering any use or occupancy. The definition is derived from the Uniform Building Code and is intended to make clear that structures such as amphitheaters, open-air pavilions, circus tents, concession stands and modular buildings are covered by these guidelines.

* Throughout the preamble, the Board asks questions or seeks information on specific issues. To assist interested parties in responding to the questions and to facilitate analysis of responses to the questions, each question is numbered and commenters are encouraged to clearly identify or refer to the question number in their comments.

These guidelines use several terms which do not appear in UFAS. The terms "area of refuge," "closed circuit telephone," "detectable warning," and "telecommunication display device or telecommunication device for the deaf (TDD)" and their definitions are discussed under the scoping provisions for new construction. See, §§ 4.1.3 (9), (15), and (17)(c). The terms "story," "mezzanine or mezzanine level," and "occupiable" and their definitions are discussed in connection with the elevator exception for facilities that are less than three stories or have less than 3,000 square feet per story. See, § 4.1.3(5). A definition has also been added for the term "ground floor" which is discussed in relation to the scoping provision for entrances. See, § 4.1.3(8). The term "technically infeasible" is used in the scoping provisions for alterations. See, § 4.1.6(1)(g). The term "transient lodging" is used to describe hotels, motels, resorts, dormitories, homeless shelters, transient group homes and other similar temporary places of lodging covered by title III of the ADA which is discussed along with other related terms in the special application section titled "Accessible Transient Lodging". See, section 9.

4. Accessible Elements and Spaces: Scope and Technical Requirements

4.1 Minimum Requirements

4.1.1 Application

When a place of public accommodation or commercial facility is newly constructed or altered, it is covered by these guidelines. Paragraph (1) makes clear that all areas of covered buildings and facilities must comply with §§ 4.1 through 4.34 of the guidelines unless otherwise provided in this section or modified by a special application section. This includes public use areas that are made available to the general public and common areas that are made available for the use of a restricted group of people such as the occupants of an office building and their guests.

Paragraph (2) points out that additional requirements are provided in special application sections 5 through 9 for restaurants and cafeterias, medical care facilities, business and mercantile facilities, libraries, and transient lodging. When a building or facility contains more than one use covered by a special application section, each portion must comply with the applicable requirements for that use. For example, if a hotel has a restaurant on the premises, the hotel would have to comply with the additional requirements

in section 9 for transient lodging and the restaurant would have to comply with the additional requirements in section 5 for restaurants and cafeterias.

Paragraph (3) specifies that areas used only by employees as work stations must be designed and constructed so that individuals with disabilities can approach, enter, and exit the area. The guidelines do not require the fixtures and built-in equipment in every work station to be fully accessible. As explained in the legislative history, modifications to fixtures and built-in equipment in individual workstations would be an issue of reasonable accommodation under title I of the ADA which prohibits discrimination in employment on the basis of disability. H. Rept. 101-485, pt. 3, at 63. Because it is always less expensive to build something new in an accessible manner than to modify it later, the legislative history recommends that, if it would not affect usability or enjoyment by the general public, consideration should be given in new construction to placing fixtures and equipment at a convenient height for accessibility or, where commercially available, purchasing new fixtures and equipment that are adjustable so that reasonable accommodations can be made in the future. *Id.* The Board wishes to emphasize that paragraph (3) applies to areas used only by employees as work stations such as the employee side of a concession stand in a sports stadium and not to public use or common use areas such as employee lounges or cafeterias which are covered by paragraph (1).

Question 2. The Board notes that the legislative history suggests that in physicians' offices only a percentage of examining rooms would have to be accessible. Because examining rooms are also employee areas, they would have to be designated and constructed so that individuals with disabilities can approach, enter, and exit the rooms. The location of particular fixtures or built-in equipment that are used only by doctors, nurses, or other health care personnel would be an issue of reasonable accommodation. The Board seeks comments on whether there are particular fixtures or built-in equipment in examining rooms that are also used by patients such as examining tables which should be addressed in these guidelines and what scoping provisions and technical specifications should apply.

Paragraph (4) clarifies that the guidelines apply to temporary buildings and structures such as reviewing stands, temporary classrooms, bleacher areas,

exhibit areas, temporary banking facilities, temporary health screening facilities, and temporary pedestrian passageways erected around construction sites. Structures, sites, and equipment directly associated with the actual processes of major construction, such as scaffolding, bridging, or materials hoists are not covered.

Question 3: With respect to trailers at construction worksites, the legislative history suggests that accessibility to those temporary structures should be treated as a reasonable accommodation issue and that under some circumstances it might fundamentally alter the nature of a construction site or be unduly costly to provide or maintain accessibility for an applicant or employee who uses a wheelchair if, for example, the site's terrain and building structure change daily as construction progresses. H. Rept. 101-485, pt. 2, at 69-70. The Board seeks comments on whether these guidelines should address construction trailers, and if so, what the guidelines should provide.

Paragraph (5)(a) incorporates the exception contained in section 303(a)(1) of the ADA and provides that, in new construction, an entity is not required to fully comply with the requirements of these guidelines where the entity can demonstrate that it is structurally impracticable.¹⁰ The legislative history states that this is a narrow exception which applies only in rare circumstances where unique characteristics of terrain prevent the incorporation of accessibility features and would destroy the physical integrity of a facility. H. Rept. 101-485, pt. 2, at 120. The legislative history gives the example of a building that must be built on stilts because of its location in marshlands or over water as one of the few situations in which the exception would apply. Id. The legislative history further states that exception does not apply to situations where a facility is located in "hilly" terrain or on a plot of land with steep slopes. Id. The legislative history also explains that the exception is not viewed as an all-or-nothing proposition. If it is structurally impracticable to comply with some requirements of these guidelines, but structurally practicable to comply with others, then the other requirements must be met. Id.

¹⁰ The term "structurally impracticable" is used differently in the ADA and these guidelines than in UFAS. UFAS uses the term in the context of alterations to describe those "[c]hanges having little likelihood of being accomplished without removing or altering a load-bearing structural member and/or incurring an increased cost of 50% or more of the value of the element of the building or facility involved." UFAS § 3.5.

Paragraph (5)(b) provides an exception for elevator pits, elevator penthouses, piping or equipment catwalks, and lookout galleries. These spaces are usually accessed only by ladders, crawl spaces, or very narrow passageways and are frequented only occasionally by service personnel for repair purposes. They are not normally considered an employee work station. Mechanical rooms, electrical and telephone closets, and general utility rooms have not been included in the exception because these spaces may be part of an employee work station and it is usually not difficult to provide access to these spaces. As discussed above, paragraph (3) requires that employee work stations be designed and constructed so that individuals with disabilities can approach, enter, and exit the area. The location of fixtures and built-in equipment in employee work stations would be an issue of reasonable accommodation.

Question 4: The Board seeks comment on whether there are other types of spaces which should be exempted from the guidelines. Instead of listing specific types of spaces, should functional criteria be developed for identifying such spaces? If so, what should the functional criteria be?

4.1.2 Accessible Sites and Exterior Facilities

This section is taken from UFAS § 4.1.1 and contains scoping provisions which describe how the technical specifications in §§ 4.2 to 4.34 are to be applied to make sites and exterior facilities accessible.

Paragraph (1) requires at least one accessible route complying with 4.3 (accessible route) to be provided within the boundary of the site. An accessible route must connect public transportation stops, accessible parking spaces, passenger loading zones, and public streets and sidewalks to an accessible building entrance. See, § 4.3 for a discussion of travel distance. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps and lifts. Paragraph (2) requires at least one accessible route complying with 4.3 (accessible route) to connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site. Paragraph (3) requires all objects that protrude from surfaces or posts into exterior circulation paths (pedestrian passageways from one place to another) to comply with 4.4 (protruding objects). Paragraph (4) requires ground surfaces along accessible routes and in

accessible spaces to comply with 4.5 (ground and floor surfaces).

Paragraph (5)(a) contains a table which specifies the minimum number of accessible parking spaces complying with 4.6 (parking) that are required to be provided when parking is provided for employees and visitors. The number is the same as specified in UFAS § 4.1.1(5)(a). Because the location of the accessible parking spaces directly affects the usability of the facility, especially in larger parking lots where an accessible entrance may be located a long distance from the accessible parking spaces, a provision has been added requiring that the accessible parking spaces be "as close as practicable to an accessible entrance." The proposed BCMC scoping provisions for the ANSI A117.1 standard and Uniform Building Code contain a similar requirement. The UFAS exception for parking providing for official government vehicles has not been included in these guidelines because the guidelines address private facilities. Paragraph (5)(b) requires that at least one passenger loading zone comply with 4.6.5 (passenger loading zones) when passenger loading zones are provided.

Question 5: Paragraph (5)(c) allows accessible parking spaces for side van lifts to be used to meet the requirements for accessible parking spaces. Although sections 4.6.3 and 4.6.6 of the guidelines include technical specifications for accessible van parking spaces (an adjacent access aisle at least 96 inches wide and minimum vertical clearance of 114 inches), neither UFAS nor these guidelines require such spaces to be provided. As a member of the Regulatory Negotiation Advisory Committee that assisted the Federal Highway Administration to develop guidelines for a uniform system for handicapped parking, the Board was made aware that some state and local parking enforcement agencies had no authority to designate or restrict the use of certain accessible parking spaces for vans only. Given this situation, the Board seeks comments on whether these guidelines should include scoping provisions for accessible van parking spaces. If so, what should be the required minimum number of accessible van parking spaces in a lot? Should accessible van parking spaces be provided in addition to the number of accessible parking spaces required by paragraph (5)(a) or should they be a percentage of those spaces?

Paragraph (5)(d) concerns accessible parking spaces at transient lodging. Where parking is provided for all occupants, one accessible parking space

is required for each accessible dwelling unit or sleeping accommodation. Where parking is provided for visitors, an additional 2 per cent of the spaces, or at least one, must be accessible.

Paragraph (5)(e) contains scoping provisions for accessible parking spaces at facilities providing medical services. The range of facilities covered by this paragraph is broader than medical care facilities covered by section 6 (e.g., hospitals and nursing homes) and includes outpatient facilities. In general, facilities providing medical services are required to comply with the scoping provisions of paragraph (5)(a) except at out-patient facilities, where 10% of the total number of parking spaces provided must be accessible; and at facilities that specialize in treatment or services for persons with mobility impairments, where 20% of the total number of parking spaces provided must be accessible.¹¹

Question 6: The Board seeks comments on whether a higher number of accessible parking spaces should be required for nonmedical facilities that serve individuals with disabilities such as vocational rehabilitation facilities.

Question 7: Paragraph (6) requires each public or common use toilet facility or bathing facility provided on a site to comply respectively with 4.22 (toilet rooms) and 4.23 (bathing facilities). Paragraph (6) includes an exception based on UFAS section 4.1.1(6) which provides that where single user portable toilet or bathing units are clustered at a location, at least one accessible unit should be installed whenever typical inaccessible units are provided. Because of the increased availability of accessible portable toilet and bathing units, the Board is considering changing the advisory "should" to a mandatory "shall" and seeks comments as to whether a mandatory requirement is appropriate and, if so, how many accessible portable units should be required in a cluster.

Paragraph (7) specifies which provisions of 4.30 (signage) apply to exterior signs. All signs are required to comply with 4.30.2 (character proportion); 4.30.3 (character height and letter spacing); and 4.30.5 (finish and contrast). Signs identifying buildings and facilities, and permanent identification of rooms or spaces (e.g., toilet facilities) are also required to comply with 4.30.4 (raised and brailled characters and pictorial symbol signs)

¹¹ UFAS section 4.1.3(5)(e)(iii) uses the term "spinal cord injury facilities." These guidelines use the more encompassing term "facilities that specialize in treatment or services for persons with mobility impairments."

and 4.30.6 (mounting location and height). These technical specifications are discussed in more detail under 4.30. Accessible parking spaces and accessible passenger loading zones are required to be identified with the international symbol of accessibility. If all entrances or all toilet and bathing facilities are not accessible, then the accessible entrances and accessible toilet and bathing facilities are required to be identified with the international symbol of accessibility. When all entrances or all toilet and bathing facilities are accessible, identification by the international symbol of accessibility is not only unnecessary but may have the undesirable effect of making people think that something "special" has been done. A provision has also been added requiring directional signage at the approach to an inaccessible entrance to indicate the route to the nearest accessible entrance.

4.1.3 Accessible Buildings: New Construction

This section is taken from UFAS section 4.1.2 and sets out the scoping provisions for the new construction of accessible buildings and facilities.

Paragraph (1) requires at least one accessible route complying with 4.3 (accessible route) to connect accessible building or facility entrances with all accessible spaces and elements within the building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Paragraph (2) requires all objects that overhang or protrude into interior circulation paths (pedestrian passageways from one place to another, including walks, hallways, courtyards, stairways, and stair landings) to comply with 4.4 (protruding objects). Paragraph (3) requires ground and floor surfaces along accessible routes and in accessible rooms and spaces to comply with 4.5 (ground and floor surfaces).

Paragraph (4) follows UFAS 4.1.2(4) and requires stairs between levels not connected by an elevator to comply with the technical specifications for accessible stairs found at 4.9.

Question 8: Although stairs are never part of an accessible route because they cannot be used by individuals who use wheelchairs, they are usable (and sometimes more usable than ramps) by many people with mobility impairments. The technical specifications for accessible stairs, including those for handrails and nosings, are extremely important for many people, especially those who use crutches, braces or prostheses, or who may rely on

handrails to maintain balance. Since there are instances where people must use stairs such as in emergency evacuation or elevator outages, the Board seeks comment on the appropriateness of requiring all stairs in new construction to comply with the technical specifications for accessible stairs.

Paragraph (5) requires one passenger elevator complying with 4.10 (elevators) to serve each level in multi-story buildings and facilities, including mezzanines, unless the elevator exception applies. If more than one elevator is provided, each elevator is required to comply with 4.10. The elevator exception is based on section 303(b) of the ADA and exempts facilities that are less than three stories or have less than 3,000 square feet per story from the elevator requirement unless the building is a shopping center, a shopping mall, the professional office of a health care provider, or another type of facility determined by the Attorney General to require the installation of an elevator based on the usage of the facility.

Section 3.5 of the guidelines defines several terms related to elevators. A "story" is defined as that portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above. If such portion of a building does not include occupiable space, it is not considered a story for purposes of these guidelines. "Occupiable" space is defined as a room or enclosed space designed for human occupancy in which individuals congregate for amusement, educational or similar purposes, or in which occupants are engaged at labor; and which is equipped with means of egress, light, and ventilation. Basements or attics which do not meet the definition of occupiable space, are not considered a story. There may be more than one floor level within a story as in the case of a mezzanine which is defined as that portion of a story which is an intermediate floor level placed within a story and having occupiable space above and below its floor. Although a mezzanine is not considered a story for purposes of determining whether the elevator exception applies, if a facility is required to have an elevator, then the elevator must serve each level, including the mezzanine. Thus, a two story motel with a mezzanine level in the lobby may come under the elevator exception. However, if a two story medical arts building has a mezzanine level, the facility falls outside the elevator exception, and an elevator would have to serve the first and second stories and the mezzanine level. The Department of

Justice regulations will define the terms "shopping center," "shopping mall," and "professional office of a health care provider."

Paragraph (5) incorporates language from the legislative history that the elevator exception "does not obviate or limit in any way the obligation to comply with the other accessibility requirements established" in section 4.13 for new construction. H. Rept. 101-485, pt. 2, at 114. For instance, if a two-story facility is not required to have an elevator, the second story would nonetheless have to be accessible, except for elevator access. Some individuals who are mobility impaired can reach the second floor by stairs with the aid of crutches. An individual might work on the second floor and keep a wheelchair in the office for getting around on the second floor. The second floor must also be accessible to persons with vision or hearing impairments. Because the ground floor must be accessible, there is marginal cost entailed in making the second floor, with the same structure and generally the same floor plan, accessible.

Paragraph (5) further provides with respect to the elevator exception that if toilet or bathing facilities are provided on a level not served by an elevator, toilet or bathing facilities must also be provided on the accessible ground floor. For instance, a newly constructed two-story movie theater may not locate restrooms only on the second story that is not served by an elevator but must locate restrooms on the accessible ground floor.

Question 9: Paragraph (5) also incorporates language from the legislative history that if a facility which is exempt from the elevator requirement nonetheless has an elevator installed, then the elevator must meet the requirements of an accessible elevator. H. Rept. No. 101-485 pt. 2, at 114. A provision has been added that such an elevator must also serve each level in the building. The Board seeks comment on the appropriateness of this provision.

Paragraph (5) also exempts elevator pits, elevator penthouses, mechanical rooms, and piping or equipment catwalks from the elevator requirement.

Question 10: In addition, paragraph (5) incorporates an exception from UFAS section 4.1.2(5) which allows accessible ramps complying with 4.8 (ramps) or, if no other alternative is feasible, accessible platform lifts complying with 4.11 (platform lifts) and other applicable local regulations to be used in lieu of an elevator. The reference to local regulations was added because a number of building codes and the

proposed BCMC scoping provisions for the ANS A117.1 standard prohibit the installation of platform lifts as part of a required accessible route in new construction. The Board seeks comments regarding platform lifts. Should they be prohibited altogether in new construction? Should they be allowed only in alterations where no other accessible means of vertical access can be provided? If allowed, should the requirement that they have the capability to be operated independently be retained? Should platform lifts be prohibited only when they interrupt an accessible means of egress? Where lifts are used in an outdoor environment, what has been the experience with maintenance and vandalism?

Paragraph (6) requires that where operable windows are provided, they must comply with 4.12 (windows). This provision is added to be consistent with MGRAD. 36 C.F.R. 1190.31(j).

Paragraphs (7) (a) through (d) specifies those doors which must comply with the technical specifications for accessible doors found at 4.13.

Paragraph (7)(a) requires at least one door at each accessible entrance to a building or facility to comply with 4.13. Paragraph (7)(b) requires at least one door at each accessible space within a building or facility to comply with 4.13. Paragraph (7)(c) requires each door that is an element of an accessible route to comply with 4.13. Paragraph (7)(d) requires each door that is provided as part of an accessible means of egress required by 4.3.10 (egress) to comply with 4.13.

Paragraph (8) restates the requirements of UFAS section 4.1.2(8) for entrances and uses the term "ground floor" instead of "grade floor". At least one principal entrance at each ground floor level to a building or facility is required to comply with 4.14 (entrances). As defined in section 3.5, an "entrance" includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware on the entry door(s) or gate(s). The definition of an "entrance" specifies that a "principal entrance" is one through which a significant number of people enter a building or facility. A "ground floor" is defined as any occupiable floor less than one story above or below grade with direct access to grade. A building or facility always has at least one ground floor and may have more than one ground floor, for example, as where a split-level entrance has been provided or where a building is built into a hillside.

When entrances normally serve transportation facilities, passenger loading zones, accessible parking facilities, taxi stands, public streets and sidewalks, or accessible interior vertical access, then at least one of the entrances serving each of those functions must be accessible. For instance, if entrance A connects directly with and normally services an accessible parking garage and entrance B normally services the public street, then each entrance would have to be accessible. However, if entrance A normally services both the accessible parking garage and the public street, paragraph (8) is satisfied by making entrance A accessible. Paragraph (8) further states that it is preferable to make all or most entrances accessible because entrances also serve as a means of egress in emergencies whose proximity to all parts of buildings and facilities is essential.

Question 11: The legislative history suggests a different requirement where a building has a split level entrance or is built into a hillside. Specifically, the Conference Report states that "[a]ccessibility requirements shall not be evaded by constructing facilities in such a way that no story constitutes a 'ground floor,' for example, by constructing a building whose main entrances leads only to stairways or escalators that connect with upper or lower floors; at least one accessible ground story must be provided." H. Rept. 101-596, at 77. The Board seeks comments on whether the requirements should be as proposed in the paragraph (8) (a building that has split level entrance or is built into a hillside would be considered to have more than one ground floor and at least one accessible entrance must be provided at each ground floor level) or as suggested in the legislative history (at least one accessible ground story must be provided). Alternatively, the Board seeks comments on whether the guidelines should require all entrances to every building to be accessible.

Paragraph (9) concerns egress and states that, in multiple-story buildings and facilities where at-grade egress from each floor is impossible, either approved fire and smoke partitions that create horizontal exits must be provided within each story, or areas of refuge complying with 4.3.11 (areas of refuge) and approved by agencies having authority for safety must be provided within each floor. Section 3.5 defines an "area of refuge" as an area, which has direct access to an exit stairway, where people who are unable to use stairs may remain safely to await further instructions or

assistance during emergency evacuations. The technical specifications for areas of refuge are discussed at 4.3.11. The definition of "egress" clarifies that an accessible means of egress does not include stairs, steps, or escalators, but that an area of refuge or evacuation elevators may be included as part of an accessible means of egress. A provision has also been added to paragraph (9) to require that, when used as part of an accessible means of egress, areas of refuge are to be provided in a number equal to that for required exits under local code provisions. For instance, if a multi-story building is required to have two exits but provides three exits, only two areas of refuge must be provided on each floor. Local building codes establish the number of required exits based on the occupant load (number of occupants that the building is designed for). The proposed BCMC scoping provisions for ANSI A117.1 and the Uniform Building Code tie the number of areas of refuge back to the occupant load. To avoid possible conflict or discrepancy with other codes, paragraph (9) relates the required number of areas of refuge to the required number of exits rather than to the occupant load.

Question 12: Paragraph (10) comes from UFAS section 4.1.2(9) and requires "approximately" 50 percent of drinking fountains or water coolers provided on each floor to comply with 4.15 (drinking fountains) and to be on an accessible route. The Board is considering requiring "at least" 50 percent to be accessible in order to make the provision more easily enforced. Because of the low mounting height of accessible drinking fountains, many people find "inaccessible" drinking fountains easier to use since they are usually mounted at a greater height from the floor; and therefore, it would not be appropriate to require 100 percent accessible fountains. The Board seeks comment on whether a specific percentage of accessible drinking fountains should be required and, if so, whether at least 50 percent would be an appropriate number?

Paragraph (11) requires each public and common use toilet facility and bathing facility to comply respectively with 4.22 (toilet rooms) and 4.23 (bathing facilities) and to be on an accessible route. Other toilet rooms, such as a private restroom which is part of an executive's office and is not intended for use by other employees, must be adaptable (i.e., capable of being altered so as to accommodate the needs of individuals with or without disabilities or to accommodate the needs of persons

with different types or degrees of disabilities).

Paragraph (12)(a) states that if fixed or built-in storage facilities such as cabinets, shelves, closets, and drawers are provided in accessible spaces, at least one of each type provided shall contain storage space complying with 4.25 (storage). Additional storage may be provided outside the maximum high reach (54 inches) and minimum low reach (9 inches) shown in Figure 38. This provision does not require shelves and display units to be entirely within these reach ranges so there is no change required in supermarket fixed shelving design or in the design of fixed clothing racks. With respect to employee work stations, as discussed under section 4.1.1(3), the guidelines do not require those areas to be equipped with accessible shelves. However, consideration should be given to placing shelves in employee work stations at a convenient height for accessibility or installing commercially available shelving that is adjustable so that reasonable accommodations can be made in the future.

Paragraph (12)(b) requires shelves or display units allowing self-service by customers in mercantile occupancies to be located on an accessible route so that individuals with mobility impairments can approach them in a manner consistent with those enjoyed by other members of the general public.

Paragraph (13) states that controls and operating mechanisms in accessible spaces, along accessible routes, or as parts of accessible elements (e.g., light switches and dispenser controls) must comply with 4.27 (controls and operating mechanisms).

Paragraph (14) provides that if emergency warning systems are provided, they must include both audible alarms and visual alarms complying with 4.28 (alarms). The technical specifications for alarms are discussed under 4.28. The alarm requirements for sleeping accommodations are discussed under 9.3. Paragraph (14) allows emergency warning systems in health care facilities to be modified to suit standard health care alarm design practice.

Paragraph (15) requires detectable warnings to be provided at hazardous conditions as specified in 4.29 (detectable warnings). A "detectable warning" is defined in section 3.5 as a standardized surface feature built in or applied to walking surfaces or other elements to warn visually impaired people of hazards on a circulation path. This requirement is discussed in more detail under 4.29.

Paragraph (16) specifies which provisions of 4.30 (signage) apply to interior signs to make them accessible to individuals with vision impairments. All signs are required to comply with 4.30.2 (character proportion); 4.30.3 (character height and letter spacing); 4.30.5 (finish and contrast); and 4.30.8 (illumination levels). Signs that provide permanent identification of rooms and spaces such as toilet facilities (e.g., men/women), room numbers, and exits are also required to comply with 4.30.4 (raised and brailled characters and pictorial symbol signs) and 4.30.6 (mounting location and height). Signs providing temporary information about rooms and spaces such as the current occupant's name do not have to comply with 4.30.4 (raised and brailled characters and pictorial symbol signs). These technical specifications are discussed in more detail under 4.30.

Question 13: The Board seeks information regarding additional types of signage that are necessary for individuals with vision impairments to participate in integrated environments and that should comply with the technical specifications for raised and brailled characters (4.30.4), and mounting location and height (4.30.6). The Board is considering requiring informational and directional signage to comply with those technical specifications, particularly where it may affect the usability of the building or facility such as signage indicating the location of an information desk, auditorium or gymnasium; specifying rules of conduct, or alerting the public to certain hazards. In areas where overhead signage is typically provided such as conference centers and bus stations, how can information on these signs be made accessible to persons who use raised and brailled characters? Section 4.30.6 requires signs to be mounted between 54 and 66 inches, and signs that provide permanent identification of rooms and spaces must be installed on the wall adjacent to the latch side of the door. In large open areas such as an indoor atrium there may be no wall or doorway in proximity to overhead signage. Are there other technologies such as audible signs that may be more usable than requiring signage to comply with the technical specifications for raised and brailled characters (4.30.4), and mounting location and height (4.30.6)? The Board seeks information regarding the benefits and costs of these requirements and alternative technologies.

Paragraph (17)(a) contains a table which specifies the number of accessible telephones required to

comply with 4.31 (telephones) when public pay telephones, public closed circuit telephones, or other public telephones are provided. The number is the same as specified in UFAS section 4.1.2(17)(a). Section 3.5 defines a "closed circuit telephones" as a telephone with dedicated line(s) such as a house phone, courtesy phone, or phone that must be used to gain entrance to a facility. The term has been added to clarify that the provision applies to all types of public telephones.

Paragraph (17)(b) specifies the number of telephones required to be equipped with a volume control for persons with hearing impairments. All telephones required to be accessible by the table in paragraph (17)(a) must be equipped with volume controls. In addition, 25 percent of each type of telephone (public pay telephones, public closed circuit telephones, and other public telephones) must also be equipped with a volume control and dispersed throughout the facility. The installation of additional volume control equipped telephones is encouraged. Telephones equipped with a volume control are to be identified by a sign containing a depiction of a telephone handset with radiating sound waves (4.30.7).

The Board believes that the proposed scoping provisions in paragraph 17(b) are consistent with the ADA mandate to improve communication accessibility. Since 1987, the State of Connecticut has required that 25 percent of coin and coinless public telephones be equipped with a volume control. The Bell Atlantic Company, serving Delaware, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia, and Washington, DC, initiated a voluntary program in 1989 to equip significant numbers of new and existing public telephones with amplification devices. Some facilities, such as the U.S. Air terminal at the Washington National Airport, equip all public pay telephones with a volume control.

Question 14: Some manufacturers provide a range of up to 18 decibels (units used to compare intensities of sound) above normal; others provide a more limited range (usually 12 decibels). The Board seeks comments on what decibel range should be specified for volume controls on telephones. The Board is also interested in obtaining information on the costs and benefits associated with various systems. Commenters are asked to address the cost of a new telephone with a volume control as compared to a new telephone without such a feature.

Paragraph 17(c) adds scoping provisions for telecommunication

display devices or telecommunication devices for the deaf (TDD) for individuals who cannot use voice telephones. Section 3.5 defines a "TDD" as a device that employs graphic (i.e., written) communications through the transmission of coded signals across the standard telephone network. Title IV of the ADA requires common carriers to provide telecommunications relay services, which will employ a third party having access to both a TDD and voice telephone to facilitate communication between TDD users and others who use voice telephones only. Individuals with severe hearing or other communication impairments will require a TDD to access this system or to call others who use TDDs. Few individuals carry a portable TDD. Even then, devices which are the most portable often are the most difficult to operate by individuals with mobility and communication impairments who lack coordination or manual dexterity. TDD telephones (a single, vandal resistant, integrated unit) are commercially available. Nothing in this provision prohibits the installation of a simple TDD adjacent to or within the telephone enclosure as long as it is usable.

Question 15: Paragraph (17)(c) requires a building or facility that has a total of six or more public pay telephones to provide at least one public pay telephone equipped with a TDD. This number would exclude many smaller buildings and facilities. The Board seeks comment on the appropriateness of using the total number of public pay telephones in a building or facility as the basis for the TDD scoping provisions and whether six public pay telephones should be the point at which to require a TDD. As an alternative, should the Board specify scoping according to occupancy type as is done in the State of Michigan? Michigan requires TDDs to be installed whenever public telephones are installed at airports having regularly scheduled flights, bus and train depots, hospitals, clinics, health care centers, senior citizen complexes, convention centers, hotels with convention centers, and covered malls. The Board also seeks more information regarding the need for public TDDs in general and at specific types of facilities. Do the general public or individuals with communication impairments have a greater need for telecommunications access in certain facilities such as airports, bus stations, conference centers, hospitals?

Question 16: Paragraph (18) states that if fixed or built-in seating or tables are provided in accessible spaces, then at least 5 percent, but always at least one,

of the fixed or built-in seating spaces or tables must comply with 4.32 (seating, tables, and work surfaces). An accessible route must lead to and through such fixed or built-in seating, tables or work surfaces. See, section 5.1 for requirements for fixed tables in restaurants and cafeterias. The Board seeks comments on whether the five percent figure is adequate or whether a lower or higher percent should be specified?

Paragraph (19)(a) contains a table specifying the number of wheelchair seating spaces required to be provided in places of assembly. The number is the same as specified in UFAS section 4.1.2(18)(a).

Paragraph (19)(b) contains scoping provisions for assistive listening systems in indoor assembly areas where audible communications are integral to the use of the space such as concert halls, theaters, meeting rooms, or banquet rooms in restaurants where community service clubs or others may meet. The requirement for a permanently installed assistive listening system in such an assembly area is triggered by any of the following: (1) If it accommodates fifty or more people; (2) if an audio amplification system is provided; or (3) if it is used regularly as a meeting or conference room.

UFAS section 4.1.2(18)(b) allows for the provision of portable listening systems in certain assembly areas where there is no audio amplification system. Paragraph 19(b) requires either a permanently installed listening system or wiring for a portable system where the assembly area does not trigger the requirement that a permanently installed system be provided. A requirement has also been added for signage notifying patrons of the availability of a system.

Paragraph (19)(b) provides greater guidance that UFAS regarding the requirements for assistive listening devices or receivers. UFAS section 4.1.2(18)(b) requires that a reasonable number of people with hearing impairments be assisted. Paragraph (19)(b) requires assistive listening devices or receivers equal to 4 percent of the total number of seats, but in no case less than two, which would provide measurable guidance. This provision is important due to a misunderstanding of the need for assistive listening devices to enable those with hearing impairments to use assistive listening systems. Assistive listening systems, in contrast to audio amplification systems, are designed to transmit sound as directly as possible to a receiver/transducer used in the ear of the listener. A common misunderstanding is

that all individuals with hearing impairments use a T-switch on a hearing aid to interact with a transmitter. Thus, it is often believed that a transmitter alone is sufficient. This is obviously untrue for those individuals with hearing impairments who do not or cannot use hearing aids. Less obvious is the fact that hearing aids are not required to be sold with a T-switch. Furthermore, not all assistive listening systems are compatible with hearing aids. Therefore, a requirement for a specific number of assistive listening devices or receivers is essential for those who need such devices.

The Bureau of the Census has reported that there are 7,213,000 individuals who have difficulty hearing what is said in a normal conversation with another person. Bureau of Census, *Disability Functional Limitation and Insurance Coverage: 1984-85*. This number does not include those who cannot hear at all. At the time the study was conducted, this number represented slightly more than 4 per cent of the total population aged 15 and older. This is a conservative number. There are other studies which indicate that a greater percentage of individuals have a hearing impairment such as the National Center for Health Statistics which found a 7.9 per cent rate. *National Health Interview Survey, 1979-80*. New York State census estimates the population of persons with hearing impairments at 9 per cent of the population. Section 1102.6(c) of the New York State Uniform Fire Prevention and Building Code requires the minimum number of assistive listening devices or receivers to be provided to be equal to 9 per cent of the total number of seats for buildings with seating of up to 1,000 seats.

Question 17: The Board seeks information regarding the use of permanently installed versus portable assistive listening systems. Specifically, in which types of assembly areas would one type of system be preferable to the other? For example, (1) should areas with fixed seating such as movie theaters or play houses have permanent systems; and (2) should shopping malls where temporary seating may be provided for special events have wiring for portable systems? Additionally, the Board seeks information regarding which types of systems (infra-red, induction loop, and FM radio) may work best in a given environment.

Question 18: An additional communication barrier is imposed at sales and service counters, teller windows, box offices, and information kiosks where a physical barrier separates service personnel and customers. Persons with certain hearing

impairments can benefit from the provision of an assistive listening system at some of these facilities. The Board seeks information regarding the extent and scope of this problem; the need for assistive listening systems; ways in which they could be provided; and costs. If services are provided at several points along a counter such as teller windows at a bank should scoping provisions be based on a percentage of the total number, or a minimum of one?

Paragraph (20) adds a new scoping provision for automated teller machines and requires that where such machines are provided, at least one machine must comply with 4.34 (automated teller machines). Paragraph (20) also includes an exception which states that drive-up-only automated teller machines are not required to comply with 4.34.2 (controls) and 4.34.3 (clearance and reach range). The technical specifications for automated teller machines are discussed at 4.34.

4.1.4 Reserve

4.1.5 Accessible Buildings: Additions

This section states that each addition to an existing building or facility shall be regarded as an alteration and shall comply with the scoping provisions for new construction, as well as alterations: the applicable technical specifications in sections 4.2 through 4.34; and special application sections 5 through 9. Section 3.5 defines an "addition" as an expansion, extension, or increase in the gross floor area of a building or facility.

4.1.6 Accessible Buildings: Alterations

Paragraph (1) is based on UFAS section 4.1.6(1) and sets out general requirements for alterations. An "alteration", as defined in section 3.5 of the guidelines, means any change to a building or facility that affects or could affect the usability of the building or facility or any part thereof. Alterations include, but are not limited to, remodeling, renovations, rehabilitation, reconstruction, historic restoration, changes or rearrangement of the structural parts or elements of a building or facility, changes or rearrangement in the plan configuration of walls and partitions, and extraordinary repair. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical or electrical systems are not considered to be alterations unless they affect the usability of the building or facility.

Paragraph (1)(a) is a new provision and states that no alteration may be undertaken which decreases or has the effect of decreasing accessibility or usability of a building or facility. The

Board has seen cases where existing facilities that incorporated accessibility features have been altered and the accessible features have been removed with the result that the overall accessibility of the facility has been decreased. The Board believes that this is contrary to the purposes of the ADA. Even when an existing facility exceeds the minimum scoping provisions of these guidelines, alterations should not result in a decrease in the level of accessibility. For example, if an existing facility has two entrances, each of which is accessible by means of a ramp complying with 4.8 (ramps), it would not be permissible to replace one of the ramps with steps even though section 4.1.3(8) provides that at least one principal entrance at ground level must be accessible.

Paragraph (1)(b) sets out the general requirement that if an existing element, space, or common area is altered, then each such altered element, space, or common area must comply with the applicable scoping provision for new construction. The key point is whether the alteration presents an opportunity to make the element, space, or common area being worked on accessible. For example, if a conference center plans to replace its audioamplification system, the facility would have to comply with section 4.1.3(19)(b) of the guidelines and install a permanent assistive listening system. If a parking garage restripes its parking spaces and does not have the number of accessible parking spaces required by 4.1.2(5)(a), the facility would have to provide the required number of such spaces.

Paragraph (1)(c) provides that if an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary for such installation, then a means of accessible vertical access must be provided that complies with 4.7 (curb ramps), 4.8 (ramps), 4.10 (elevators), or 4.11 (platform lifts). UFAS section 4.1.6(1)(b) contains a similar requirement which is derived from MGRAD. 36 CFR 1190.33(a)(3).

Paragraph (1)(d) states that if alterations of single elements, when considered together, amount to an alteration of a room or space in a building or facility, then the entire room or space must be made accessible. For example, if renovations are planned to a restroom, including new plumbing, water closets, toilet stalls, and lavatories, then the entire restroom, including the doorway, would have to comply with the technical specifications for accessible restrooms (4.22).

Paragraph 1(e) clarifies that this section does not impose a requirement

for greater accessibility than would be required for new construction. For example, if the elevators and stairs in a building are being altered and the elevators are made accessible, then no accessibility modifications are required to the stairs connecting levels now connected by the accessible elevators since the scoping provisions for new construction require only stairs connecting levels that are not connected by an elevator to comply with 4.9 (stairs). However, if modifications to the stairs are required by a local code to correct unsafe conditions, then the modifications must be done in accordance with these guidelines unless technically infeasible (this term is discussed under paragraph (1)(g)).

Paragraph (1)(f) concerns alterations limited solely to electrical, mechanical, or plumbing systems, or to asbestos removal and is further discussed in a note to paragraph (2).

Paragraph (1)(g) contains an exception if it is "technically infeasible" to fully comply with the accessibility requirements for alterations. Section 303(a)(2) of the ADA contemplates such an exception when it states that alterations are to be made in an accessible manner "to the maximum extent feasible." The legislative history explains the phrase "to the maximum extent feasible" was used to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being fully accessible. H. Rept. 101-485, pt. 2, at 114. The term "technically infeasible" is defined in section 3.5 of the guidelines as meaning that an alteration has little likelihood of being accomplished in an accessible manner because existing structural conditions would require removing or altering a load-bearing member or because site constraints prohibit modification or addition of elements, spaces or features necessary to provide accessibility.¹²

¹² UFAS uses the term "structurally impracticable" to describe alterations which have little likelihood of being accomplished in an accessible manner without removing load-bearing structural member and/or incurring an increased cost of 50 percent or more of the value of the element of the building or facility involved. Section 303(a)(1) of the ADA and these guidelines use the term "structurally impracticable" to describe an exception in new construction. See, section 4.1.1(5) of these guidelines and related discussion. Thus, these guidelines use the term "technically infeasible" to describe the exception for alterations. A cost factor is not included in the definition of "technically infeasible" because section 303(a)(2) of the ADA addresses the issue of cost in the context of alterations that affect or could affect usability of or access to an area of the facility containing a primary function. See section 4.1.6(2) of these guidelines and related discussion.

As in the case of the exception for structural impracticability in new construction, the technically infeasible exception for alterations is not to be viewed as an all-or-nothing proposition. If it is technically infeasible to comply with some of the requirements for alterations, but technically feasible to comply with others, then the other requirements must be met. Any altered feature of the facility or portion of the facility that can be made accessible, must be made accessible to the maximum extent feasible.

Paragraph (1)(h) incorporates the exception from section 303(b) of the ADA which does not require the installation of an elevator in newly constructed or altered facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, the professional office of a health care provider, or another type of facility or determined by the Attorney General. This exception is discussed in detail under the new construction requirements. See, section 4.1.3(5).

Paragraph (2) restates the requirement of section 303(a)(2) of the ADA with respect to alterations that affect or could affect the usability of or access to an area of the facility containing a primary function. In the case of such alterations, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered areas must be made accessible to the extent that these additional accessibility features are not disproportionate to the overall alterations in terms of cost and scope, as determined under criteria established by the Attorney General.¹³ The Department of Justice regulations will address the implementation of this provision.

Paragraph (3) contains special technical provisions for alterations to existing buildings and facilities where it is technically infeasible to comply with certain provisions of 4.2 through 4.34 or where other specified conditions prevent compliance. For example, paragraph (3)(a) allows slightly steeper slopes for short curb ramps and interior or exterior ramps to be constructed on existing sites or in existing buildings or facilities where space limitations prohibit compliance with 4.8.2 which requires a maximum slope of 1:12 in new construction. Paragraph (3)(e)(i) permits the installation of at least one unisex

¹³ Paragraph (1)(f) provides that this requirement does not apply if the alteration work is limited solely to the electrical, mechanical, or plumbing system or to asbestos removal, and does not involve the alteration of any elements or spaces required to be accessible under these guidelines.

toilet per floor located in the same area as existing toilet facilities where it is technically infeasible to modify existing toilet facilities to comply with 4.22 (toilet rooms) and 4.23 (bathrooms, bathing facilities, and shower rooms). Each unisex toilet must contain one water closet complying with 4.16 (water closets) and one lavatory complying with 4.19 (lavatories and mirrors), and the door must have a privacy latch. The other special technical provisions relate to extension of handrails at stairs (paragraph (3)(b)); automatic door reopening devices in elevators (paragraph (3)(c)(i)); inside car dimensions in elevators (paragraph (3)(c)(ii)); clear opening width requirements for doors (paragraph (3)(d)(i)); thresholds at doors (paragraph (3)(d)(ii)); accessible seating and companion seating in assembly areas (paragraph (3)(g)(i)); and performing areas in assembly areas (paragraph (3)(g)(ii)). Paragraph (f) adds provisions for directional signage indicating the nearest accessible entrances and toilet or bathing facilities when an entrance other than a principal entrance is made accessible and when inaccessible toilet or bathing facilities are allowed to remain in an existing building or facility.

4.1.7 Accessible Buildings: Historic Preservation

This section implements section 504(c) of the ADA which requires that the guidelines include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in UFAS section 4.1.7(1)(a). Paragraph (1)(a) of the guidelines incorporates UFAS section 4.1.7(1)(a) and defines qualified historic buildings or facilities as those buildings and facilities that are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a State or local law.

Section 504(c) of the ADA further requires that with respect to alterations of buildings and facilities that are eligible for listing in the National Register of Historic Places, the guidelines shall, at a minimum, maintain the procedures and requirements established in UFAS sections 4.1.7 (1) and (2). Paragraphs (1) (a), (b), and (c) of the guidelines incorporate UFAS section 4.1.7(1) and provides for comments to be obtained from the Advisory Council on Historic Preservation (Advisory Council) when required by section 106 of the National Historic Preservation Act of 1966, as amended, before altering a qualified historic building or facility with respect

to whether the requirements for accessible routes (exterior and interior), ramps, entrances, toilets, parking and displays and signage would threaten or destroy the historic significance of the building or facility. If the Advisory Council makes a written determination that the accessibility requirements for any of these features would threaten or destroy the historic significance of the building or facility, the alternative minimum requirements listed in paragraphs (2) (a) through (h) of the guidelines may be used for that feature.

Question 19: With regard to those buildings and facilities designated as historic under State or local law, section 504(c) of the ADA requires that the guidelines contain procedures equivalent to those established for buildings and facilities that are eligible for listing in the National Register of Historic Places. Those States and local governments that have their historic preservation programs certified by the Secretary of the Interior for funding purposes pursuant to the National Historic Preservation Act of 1966, as amended, are required to establish qualified State historic preservation review boards and local historic review commissions. 16 U.S.C. 470a. The Board seeks comments on the appropriateness of using those State boards and local commissions, where they exist, for purposes of making a written determination whether the requirements for accessible features would threaten or destroy the historic significance of properties designated as historic under their State or local program. The Board also seeks comments on what procedures should be used for State and local governments whose historic preservation programs are not certified by the Secretary of Interior.

Question 20: Paragraphs (2) (a) through (e) of the guidelines incorporate UFAS section 4.1.7(2) and provide alternative minimum requirements for accessible routes, entrances, toilets, and displays and signage that may be used when the Advisory Council determines that complying with a specific accessibility requirement would threaten or destroy the historic significance of the building or facility. For instance, paragraph (2)(b) provides that if the Advisory Council determines that making a principal entrance of a facility accessible would threaten or destroy the historic significance of the building and no other entrances used by the public can comply with 4.14 (entrances), then an entrance not used by the public but "open (unlocked)" may be made accessible. Directional signage must be provided at the inaccessible

entrance indicating the location of the accessible entrance. The intent of the provision is to provide convenient and independent access to individuals with disabilities in a manner consistent with that provided other members of the public. The Board realizes, however, that this requirement may result in security problems. The Board is considering changing this provision to allow security needs to be addressed as long as convenience and independent access is facilitated at the other entrance. The Board seeks comments regarding this issue.

4.2 through 4.34 Technical Specifications

The following sections of the 1980 version of the ANSI A117.1 standard are taken from UFAS and reprinted in the guidelines:¹⁴

- 4.2 Space Allowance and Reach Ranges
- 4.3 Accessible Route
- 4.4 Protruding Objects
- 4.5 Ground and Floor Surfaces
- 4.6 Parking and Passenger Loading Zones
- 4.7 Curb Ramps
- 4.8 Ramps
- 4.9 Stairs
- 4.10 Elevators
- 4.11 Platform Lifts
- 4.12 Windows
- 4.13 Doors
- 4.14 Entrances
- 4.15 Drinking Fountains and Water Coolers
- 4.16 Water Closets
- 4.17 Toilet Stalls
- 4.18 Urinals
- 4.19 Lavatories and Mirrors
- 4.20 Bathtubs
- 4.21 Shower Stalls
- 4.22 Toilet Rooms
- 4.23 Bathrooms, Bathing Facilities, and Shower Rooms
- 4.24 Sinks
- 4.25 Storage
- 4.26 Handrails, Grab Bars, Tub and Shower Seats
- 4.27 Controls and Operating Mechanisms
- 4.28 Alarms
- 4.29 Detectable Warnings
- 4.30 Signage
- 4.31 Telephones
- 4.32 Seating, Tables, and Work Spaces
- 4.33 Assembly Areas

UFAS contains modifications and additions to the ANSI A117.1 standard. Unless otherwise discussed below, the modifications and additions contained in UFAS are incorporated in these guidelines and noted by italics.

The ANSI A117.1 standard has been generally accepted by the private sector.

¹⁴ The ANSI A117.1 standard is reprinted with permission from the American National Standards Institute. Copies of the ANSI A117.1 standard may be purchased from the American National Standards Institute at 1430 Broadway, New York, N.Y. 10018.

The appendix to the guidelines contains additional information about some of the technical specifications. Those section numbers are marked with an asterisk in the guidelines. After the Department of Justice establishes accessibility standards based on these guidelines, the Board intends to make available manuals explaining the standards and to provide training and technical assistance.

As discussed below, the Board proposes to modify or add provisions to the following technical specifications which are also noted by italics:¹⁵

- 4.3.10 Accessible Route: Egress
- 4.3.11 Accessible Route: Areas of Refuge
- 4.5.3 Ground and Floor Surfaces: Carpet
- 4.7.7 Curb Ramps: Detectable Warnings
- 4.9.2 Stairs: Treads and Risers
- 4.9.5 Stairs: Detectable Warnings
- 4.12 Windows
- 4.22.3 Toilet Rooms: Clear Floor Space
- 4.23.3 Bathrooms: Clear Floor Space
- 4.28 Alarms
- 4.29 Detectable Warnings
- 4.30 Signage

The Board also proposes to add a section 4.34 for automated teller machines. Wherever possible, the Board has attempted to be consistent with the planned revisions to the ANSI A117.1 standard when proposing modifications or additions to the technical specifications.

In addition, the Board is considering possible changes to or seeks information regarding the following sections:

- 4.3 Accessible Route: Travel Distance
- 4.3 Accessible Route: Ramps and Stairs
- 4.4 Protruding Objects: General
- 4.5 Ground and Floor Surfaces: Slip Resistance
- 4.8 Ramps: Slip Resistance
- 4.8.2 Ramps: Slope and Rise
- 4.10 Elevators: Handrails
- 4.17 Toilet Stalls: Width and Grab Bars
- 4.33 Assembly Areas: Row Spacing and Lines of Sight

The Board also seeks comments regarding adding a new section for dressing and fitting rooms.

Those sections that the Board is proposing to modify or add to, or that the Board is considering possible changes to or seeks information on, are discussed below.

4.3 Accessible Route: Travel Distance

Question 21: At least one accessible route must be provided within the boundary of the site from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the

¹⁵ The proposed changes to sections 4.3.10; 4.5.3; 4.12; 4.22.3; and 4.23.3 relate to modifications and additions made by UFAS and do not affect the 1980 or 1986 versions of the ANSI A117.1 standard.

accessible building entrance they serve. The Board recognizes that there is some concern among persons with disabilities regarding the issue of travel distances between points on an accessible route, especially lengthy travel distances between accessible parking spaces and accessible building entrances. The more direct routes are frequently inaccessible. The Board is considering adding specific language to section 4.3 to address this issue and seeks comment on the following options: (1) The accessible route shall be the "shortest possible route"; (2) the accessible route shall be the "shortest, most direct route practicable"; or (3) the route of travel for persons with disabilities, including an accessible building entrance and an accessible route, shall, to the maximum extent feasible, coincide with the route of travel for the general public.

4.3 Accessible Route: Ramps and Stairs

Question 22: An accessible means of vertical access such as a ramp must be provided if an accessible route has changes in level. Stairs are not permitted as part of an accessible route. Although many ambulatory persons with mobility impairments require elements of an accessible route such as a firm, stable, and slip resistant ground and floor surfaces, they may be unable to maintain balance where the cross slope of a path exceeds 1:50 or may experience more difficulty negotiating ramps, than stairs. For example, individuals with above knee amputations may not have the ability to flex a prosthetic knee joint while walking. Given this information, should the Board include a requirement for stairs to be provided adjacent to ramps when they are part of an accessible route?

4.3.10 Accessible Route: Egress

4.3.11 Accessible Route: Area of Refuge

Section 4.3.10 provides that accessible routes serving any accessible space or element shall also serve as a means of egress for emergencies or connect to an accessible place of refuge. See, section 4.1.3(9) for discussion of related scoping provisions for accessible means of egress and areas of refuge. Neither UFAS nor the ANSI A117.1 standard contain any technical specifications for places of refuge, but rather state that such areas shall comply with the requirements of the administrative authority having jurisdiction.

The model building codes and the Life Safety Code of the National Fire Protection Association include

provisions for areas of refuge as part of a horizontal exit. A horizontal exit is an option utilized in certain cases to satisfy partially the requirement for multiple exits from a building, and is not a "required" type of exit. Very few existing buildings, other than hospitals, have horizontal exits or their associated areas of refuge. As described in the building and life safety codes, areas of refuge address the space needs of the entire building population on the floor level in question and go far beyond the needs of people with disabilities.

The Board proposes to delete the provisions requiring that areas of refuge comply with the requirements of the administrative authority having jurisdiction and to add a new section 4.3.11 titled "Areas of Refuge" that would provide technical specifications for such areas.

The report of the Board sponsored research project on egress, the proposed BCMC scoping provisions for the ANSI A117.1 standard, and the Uniform Building Code were considered in developing the new section. As defined in section 3.5, an "area of refuge" is an area, which has direct access to an exit stairway, where people who are unable to use stairs may remain safely to await further instruction or assistance during emergency evacuation. Section 4.3.11 requires that each area of refuge have a one-hour minimum fire-resistive separation and direct access to an exit stairway (if above or below the ground floor level). In addition, an area of refuge may have access to an egress elevator where such elevator is designed and constructed as being suitable for emergency evacuation when operated by trained emergency service personnel. Each area of refuge is required to provide a minimum of two wheelchair spaces (30 inches by 48 inches each) which may not be part of, nor encroach upon, any required exit, corridor, or landing dimension. A landing in an exit stair which does not contain a standpipe may be used as an area of refuge if the requirements of the preceding sentence are met. Section 4.3.11 also contains provisions for travel to an area of refuge; doors; a two-way communication system with both visible and audible signals; and signage.

4.4.1 Protruding Objects: General

Question 23: Section 4.4.1 provides that objects protruding from walls with their leading edges between 27 inches and 80 inches above the finished floor (e.g., telephones) may protrude no more than 4 inches into walks, halls, corridors, passageways, or aisles. The Board seeks information on whether this

provision is adequate in preventing a hazard to persons with impaired vision who often use the wall as a shoreline, especially people with low vision who sometimes do not use mobility aids such as canes and dog guides.

Question 24: Section 4.4.1 further provides that objects with their leading edges at or below 27 inches above the finished floor may protrude any amount. This provision is based on an assumption that most people with severe vision impairments use long canes as a mobility aid and that an object can be detected if its lowest surface is not more than 27 inches above the floor. The Board seeks information on whether this provision gives adequate warning to individuals who use canes and those who do not use canes. If adequate warning is not given, what changes should be made to the provision?

4.5 Ground and Floor Surfaces: Slip Resistance

4.8 Ramps: Slip Resistance

Floors, walks, ramps, stairs, and curb cuts along accessible routes and in accessible rooms and spaces are required to be stable, firm, and slip resistant; however, no quantitative measure has been assigned for slip resistance. This has led to the use of some inappropriate materials, especially for ramps. To address this issue, the Board sponsored a research project involving tests of actual subjects with disabilities walking or wheeling across a device to measure frictional forces under a variety of conditions. While the coefficient of friction under these conditions is a dynamic variable, which cannot be readily measured in the field, the static coefficient of friction can serve as an approximation. The research project concluded that persons with disabilities have a need for greater friction on walking surfaces than do others. The research project report, *Slip Resistant Surfaces*, is available from the Board and the National Technical Information Services (NTIS), Springfield, Virginia.

Based on the findings of the research project, the Board is considering assigning a value for slip resistance in the technical specifications for ground and floor surfaces, and ramps. Specifically, the Board is considering requiring ground and floor surface materials (other than on ramps) to have a static coefficient of friction of 0.6; and ramp materials to have a static coefficient of friction of 0.8. These values, would be measured on a clean, dry surface installed according to the manufacturer's instructions. The

research project report includes a list of common building materials and their respective coefficients. As measured, they provide an approximation of surface properties needed to ensure accessibility.

Question 25: The Board recognizes that the slip resistance of materials varies widely due to factors over which the builder or designer has no control, such as the maintenance of the surface and the presence of water or other contaminants. These factors cannot be addressed by a design or construction standard. Nevertheless, inclusion of values for slip resistance will require builders and designers to consider carefully the choice of materials and will at least discourage the use of inappropriate materials. The Board seeks comments on whether this approach is workable or whether there is a better method of measuring slip resistance. Comment is also sought on whether appropriate values for slip resistance should be included for ground and floor surfaces in other sections such as bathing facilities (4.23).

4.5.3 Ground and Floor Surfaces: Carpet

This section provides among other things that the maximum pile height for carpet or carpet tile used on a ground or floor surface shall be $\frac{1}{4}$ inch. UFAS added a provision which does not appear in the ANSI A117.1 standard that if carpet tile is used on an accessible ground or floor surface, it shall have a maximum combined thickness of pile, cushion, and backing height of $\frac{1}{4}$ inches. The Board has not adopted the UFAS provision.

4.8.2 Ramps: Slope and Rise

Question 26: Section 4.8.2 provides that the least possible slope shall be used for any ramp and that the maximum slope of a ramp in new construction shall be 1:12. The Board is aware of concerns which have been raised regarding the 1:12 maximum slope of a ramp in new construction. On lighter weight sport-type wheelchairs, the axle is frequently placed forward to allow a tighter turning radius and to reduce the weight on the front wheels, making the risk of tipping backward on a steep ramp in such a wheelchair greater than in a standard wheelchair. The number of persons using lighter weight sport-type wheelchairs has increased in recent years. Additionally, individuals using standard wheelchairs who have poor upper body strength have difficult negotiating ramps with a 1:12 slope. Research conducted in the mid-1970s at the University of Syracuse showed that only 56 percent of the

individuals could negotiate a full 30 foot run of a ramp with a 1:12 slope. *Accessible Buildings for People with Walking and Reaching Limitations*, U.S. Department of Housing and Urban Development (1979). Of those subjects unable to use a 1:12 ramp, 65 percent were able to travel 30 feet of a 1:16 ramp. For any requirement, there is some percentage of persons who are not accommodated. The Board seeks comments regarding whether the 1:12 * maximum slope should be changed and what costs would be associated with a reduction of this maximum slope?

4.9.2 Stairs: Trends and Risers

The analogous UFAS section provides that open risers are not permitted on accessible routes.¹⁶ Since stairs are never part of an accessible route, the Board proposes to prohibit open risers on stairs.

4.10 Elevators

Question 27: The lack of handrails in elevators often presents unique problems for ambulatory persons with mobility impairments. Many State and local accessibility codes require handrails in elevators and the elevator industry recommends they be included. See, National Elevator Industry Institute, *Minimum Passenger Elevator Requirements for the Handicapped*. The Board seeks comments on whether handrails should be required in elevator cars and, if so, should they comply with the technical specifications for handrails at 4.26? What specific location and mounting requirements should apply? Where should handrails be located in relationship to elevator controls?

4.12 Windows

This section is reserved in UFAS. MGRAD has adopted the provisions for windows from the 1986 version of the ANSI A117.1 standard, 36 CFR 1190.31(j); 1190.40. The Board proposes to include those provisions in the ADA guidelines.

4.17 Toilet Stalls: Width and Grab Bars

Question 28: Section 4.17.3 requires use of the 60 inch wide standard stall (Figure 30(a)) and allows the 36 inch or 48 inch wide alternate stalls (Figure 30(b)) only in alterations where provision of the standard stall is technically infeasible or where local plumbing codes prohibit reduction in the

number of fixtures.¹⁷ A 60 inch width allows a clear space on one side of the toilet to enable persons who use wheelchairs to perform a side or diagonal transfer from a wheelchair to the toilet. However, some persons with disabilities who use mobility aids such as a walker, cane or crutches are better able to use the dual parallel grab bars in the 36 inch wide alternate stall to achieve a standing position. These persons feel that dual parallel grab bars are most effective for their needs. A possible way to accommodate these individuals as well as wheelchair users who require the standard 60 inch wide stall is to require movable grab bars. The design might provide accommodations for a wider range of persons. The Board requests information on the following questions:

(a) Section 4.17.3 requires grab bars in toilet stalls to comply with 4.26. Section 4.26.3 specifies structural strength at any point along the grab bar. If properly installed, can movable grab bars available on the market comply with 4.26.3?

(b) What are the costs associated with installation of movable grab bars in both new construction and alterations as compared to providing a standard stall?

(c) If movable grab bars are left in a parallel position can they be moved independently by a person with a severe mobility impairment who needs the required clearances provided in the standard stall?

(d) How do movable grab bars compare to currently required grab bars with respect to general maintenance and susceptibility to abuse and vandalism?

(e) Should movable grab bars be required only in certain occupancy types such as nursing homes or airports?

Question 29: Another option is to require that a 36 inch wide alternate stall or a conventional non-accessible stall be equipped with dual parallel grab bars. This would be required in addition to the 60 inch wide standard stall with its current grab bar requirements. The Board seeks comments on this option, including whether a conventional stall, which may vary in width, would provide adequate clearance between the grab bars to assure individuals of sufficient leverage for rising to a standing position.

4.22.3 Toilet Rooms: Clear Floor Space

4.23.3 Bathrooms: Clear Floor Space

These sections require an unobstructed turning space complying with 4.2.3 (a clear space of 60 inch diameter) to be provided within an

¹⁶ This provision was originally added by UFAS to the 1986 version of the ANSI A117.1 standard. The 1986 version of the ANSI A117.1 standard incorporates the UFAS provision.

¹⁷ The ANSI A117.1 standard allows either the standard or alternate toilet stalls to be used in new construction or alterations.

accessible toilet room and an accessible bathroom. UFAS added an exception which does not appear in the ANSI A117.1 standard allowing a toilet room or bathroom with only one water closet and one lavatory (and one bathtub or shower in the case of a bathroom) to have a clear floor space of 30 inches by 60 inches. The Board proposes to omit this UFAS exception from the sections.

4.28.1 Alarms: General

4.28.3 Alarms: Visual Alarms

These sections are based on a Board sponsored research project on visual signals. The research project included human factors tests on the characteristics of visual signals which might be used as emergency alarms for persons with hearing impairments and involved over 200 subjects in both laboratory and field settings. Copies of the research project report, *Visual Signals Project*, are available from the Board and the National Technical Information Service, Springfield, Virginia. The Board has presented the results of the research project to the ANSI A117 Committee which is in the process of revising the ANSI A117.1 standard. The Board has attempted to be consistent with the planned revisions to these sections in the ANSI A117.1 standard.

The research team that conducted the project considered the level of coverage and cost, and recommended the use of visual signals in all restrooms; any other public use or common use areas where an individual with a hearing impairment is likely to be alone at anytime such as hallways, lobbies, employee lounge areas, and copier rooms; and individual work stations where an individual with a hearing impairment is an assigned occupant. The Board has incorporated this recommendation in section 4.28.1, except for requiring visual signal appliances at individual work stations because it is not possible to know during the design and construction of a building which individual work stations might be occupied by persons with hearing impairments. The provision of a visual signal appliance at a particular work station would be an issue of reasonable accommodation when an individual with a hearing impairment is employed. The Board has also incorporated in section 4.28.3 the findings of the research project regarding those photometric and placement features which were generally effective in altering people with hearing impairments.

4.28.2 Alarms: Audible Alarms

Question 30: This section establishes sound levels for audible emergency alarms. Many individuals confuse audible emergency alarms with other auditory signals such as elevator emergency bells. Standardization of emergency alarms within buildings and facilities should alleviate this problem and provide a greater likelihood of timely responses. The Board seeks comment on whether this concern is an accessibility issue to be addressed in these guidelines or a life safety issue equally affecting all members of the general public which is more appropriately addressed by other codes?

4.28.4 Alarms: Auxiliary Alarms

This section concerns the provision of visual alarms for hearing impaired persons in dwelling units and sleeping accommodations. See, section 9.3 and related discussion on requirements for visual alarms in hotels, motels, inns, boarding houses, dormitories, resorts, and other similar places of transient lodging. The Board proposes to add a provision to this section which would require that when visual alarms are in place, they shall be visible in all areas of the unit or room.

4.29.2 Detectable Warnings on Walking Surfaces

A detectable warning is a standardized surface feature built in or applied to walking surfaces or other elements to warn individuals with visual impairments of hazards on a circulation path (e.g., walks, hallways, courtyards, stairways, and stair landings). Persons with little or no usable vision rely on tactile, sound, and resilience contrasts to detect hazards. Persons with some vision rely on visual contrasts to detect hazards.

When the Board developed MGRAD in the early 1980's, it reserved most of the sections on detectable warnings (then called tactile warnings) pending research on the area and the same was done in UFAS.¹⁰ In 1985, the Board sponsored a research project which compared a variety of existing surface treatments for detectability. The research project found that, of various cues detectable by cane and foot, textural changes are the least detectable. Grooves are not only poorly detectable but may fill with dirt, floor

¹⁰ The 1980 version of the ANSI A117.1 standard requires detectable warning textures on walking surfaces to consist of exposed aggregate concrete, cushioned surfaces made of rubber or plastic, raised strips, or grooves (indoor only) and to contrast with the texture of the surrounding surface. ANSI A117.1-1980, section 4.27.2.

wax, snow and ice, and other materials so as to be indistinguishable from normal expansion joints, tile grout, and other surface characteristics. From the perspective of simple detection, artificial grass, ribbed matting, and a ½ in checker plate were all found reliable at the rate of 80 per cent or better. Even though there was a high detectability rate, subjects were unable to recognize these surfaces as "warnings" since they were commonly used as flooring and walking surfaces.

When the Board revised MGRAD in 1987-88, it continued to reserve most of the sections on detectable warnings because the findings of the research project did not support the use of any one surface or material that would consistently serve as a detectable warning. However, subsequent research sponsored by the U.S. Department of Transportation, Urban Mass Transit Administration in 1987, compared the detectability of vinyl synthetic rubber warning tiles with raised domes, and pvc and epoxy poly aggregate corduroy with domed ridges. Both features were found to be highly detectable but results suggest that the raised dome tile was readily discriminated from other surfaces even when installed adjacent to materials with similar resiliency characteristics. See, *Tactile Warnings to Promote Safety in the Vicinity of Transit Platform Edges*, Urban Mass Transportation Administration (1987). A study published in February 1988 by the Metro-Dade Transit Agency in Florida compared detectable warnings consisting of raised truncated domes to a granite transit platform edge and curbs and found that raised truncated domes were "significantly more detectable" than the granite edge. See, *Pathfinder Tactile Tile Demonstration Test Project*, Metro-Dade Transit Agency (1988). These warnings were further found to "insignificantly" affect the ability of wheelchair users to utilize curb ramps. Passenger injuries data from the Bay Area Rapid Transit System in California indicate a decrease in the number of slips and falls in 1988 after the installation of detectable warnings with raised truncated domes at the edge of station platforms.

The planned revisions to the ANSI A117.1 standard are expected to include a provision for detectable warnings consisting of truncated domes. In light of the more recent research and the planned revisions to the ANSI A117.1 standard, the Board proposes to require the use of raised truncated domes in section 4.29.2 (detectable warnings on walking surfaces). These domes can be constructed using a variety of methods

including concrete stamping or the application of a prefabricated surface treatment. Since resilience changes (e.g., contrasting concrete, ceramic tile or masonry against rubber tile, vinyl tile, or tennis court material) are the most universally detectable, the Board also proposes to require detectable warnings used on interior surfaces to differ from adjoining walking surfaces in resiliency or sound-on-cane contact.

The planned revisions to the ANSI A117.1 standard for detectable warnings are also expected to include a provision for a contrasting yellow color. The Board is not inclined to adopt this proposal until further research is conducted regarding the visibility of the color yellow as contrasted to light colored pavements by persons with low vision under diverse lighting conditions. Instead, the Board proposes to specify a visual contrast formula derived from a Board sponsored research project on the information and signage needs of persons with low vision. The formula is a standard comparison ratio and specifies a 70 percent visual contrast with adjoining surfaces. Copies of the research project report, *Information Systems for Low Vision Persons*, are available from the Board and the National Technical Information Service, Springfield, Virginia. According to the American Foundation for the Blind, 85 percent of the 1.4 million legally blind Americans have some usable vision and would benefit from a specific requirement for contrast.

Question 31: The Board seeks comments on the following questions:

- (a) Is a 70 percent contrast between the detectable warning and adjoining surfaces too difficult to achieve?
- (b) Does any research indicate that another ratio may be more appropriate?
- (c) Would a one inch black band between the detectable warning and adjoining surfaces provide sufficient contrast for persons with low vision?

4.9.5 Detectable Warnings at Stairs

4.7.7 Curb Ramps: Detectable Warnings

4.29.4 Detectable Warnings at Stairs

4.29.5 Detectable Warnings at Hazardous Vehicular Areas

4.29.6 Detectable Warnings at Reflecting Pools

These sections were reserved in MGRAD and UFAS pending the adoption of technical specifications for detectable warnings. Since the Board has proposed technical specifications for detectable warnings in 4.29.2, the Board further proposes to adopt these sections from the 1986 version of ANSI

A117.1 standard. With respect to detectable warnings at stairs, the Board proposes to require the detectable warning to be 36 inches deep; extend the width of the stair run; and be separated from the top stair edge by a distance equal to the width of one thread.

4.30 Signage

With the exception of 4.30.2 (character proportion), the Board proposes to modify or add provisions to the sections relating to signage. Many of the proposed provisions are based on a Board sponsored research project on information and signage needs of persons with low vision, and are generally consistent with the planned revisions to the ANSI A117.1 standard. Copies of the research project report, *Information Systems for Low Vision Persons*, are available from the Board or the National Technical Information System, Springfield, Virginia.

4.30.1 General

The Board proposes to add a provision to this section requiring that directional signage be provided at inaccessible entrances indicating the location of the nearest accessible entrance.

4.30.3 Character Height and Letter Spacing

The Board sponsored research project on information and signage needs of persons with low vision found that viewing distance is critical for reading signage and that persons with low vision need to be ten times closer to read certain signs than those with normal vision. The research project also found that wide spacing was easier to read for persons with low vision and helped to reduce the halo-effect around letters in internally lighted signs.

Based on these research findings, the Board proposes to add a new section 4.30.3 which provides for characters and numbers on signs to be sized according to the viewing distance from which they are to be read. Wall mounted signs within 66 inches of the floor would be required to have 1 inch minimum character height; and signs mounted above 66 inches, or suspended or projected overhead in compliance with 4.4.2 (protruding objects must have 80 inches minimum clear head room), would be required to have 3 inches minimum character height.¹⁹ Building

directories mounted at any height would be required to have $\frac{1}{2}$ inch minimum character height because of their overall size and the temporary nature of the information displayed on such signs.

Section 4.30.3 would also require that spacing between letters be "wide" by industry practice and that, generally, the space be $\frac{1}{2}$ the height of upper case letters.

4.30.4 Raised and Brailled Characters and Pictorial Symbol Signs (Pictograms)

4.30.6 Mounting Location and Height

These two sections concern tactile signage and apply to exterior signage identifying buildings and facilities, and exterior and interior signage that provides permanent identification of rooms and spaces such as toilet facilities and room numbers. See, sections 4.1.2(7) and 4.1.3(16) for scoping provisions.

Section 4.30.4 provides that letters and numerals shall be raised $\frac{1}{2}$ inch, upper case, sans serif or simple serif type, and accompanied by Grade 2 Braille. The appendix to the guidelines includes information about Braille dimensions. Section 4.30.4 also requires that pictograms be accompanied by equivalent verbal description placed directly below the pictogram and that the border dimension for the pictogram be 6 inches minimum in height.

Section 4.30.4 differs from UFAS in several respects. UFAS permits incised letters to be used. However, research has shown that incised letters cannot be reliably read by touch. Neither the 1986 version of the ANSI A117.1 standard nor the existing MGRAD permit the use of incised letters and, therefore, they are not permitted by section 4.30.4. See, ANSI A117.1-1986; section 4.28.4; 36 CFR 1190.31(p), 1190.40. UFAS does not allow serif type letters. For signs intended to be read only visually, no statistically significant differences have been found between simple serif and sans serif type. For this reason, section 4.30.4 permits simple serif characters. Requirements have also been added for upper case characters and Braille. For those individuals who use Braille, it is the preferred medium. Grade 2 Braille is presented in contracted form similar to shorthand and requires less physical contact on the part of the reader. The planned revisions to the ANSI A117.1 standard are expected to include similar requirements for upper case characters and Grade 2 Braille on tactile signage.

Pictograms that are presented without verbal description present barriers to persons with insufficient vision to see detail, as well as to persons with certain disabilities involving the organization of

¹⁹ The planned revisions to the ANSI A117.1 standard are also expected to add a section on character height. The mounting heights referenced in section 4.30.3 of these guidelines and the planned revisions to the ANSI A117.1 standard are consistent with those specified for tactile signage in each document. See, section 4.30.6.

visual perception. Standardization of all pictograms would be extremely difficult and the benefit is questionable. A requirement for accompanying verbal description allows for greater flexibility in design while accommodating persons who are unable to make use of pictograms (e.g. stick figures used to identify restrooms being accompanied by the words "Men" and "Women"). This requirement is consistent with the planned revisions to the ANSI A117.1 standard.

Section 4.30.6 is based on UFAS and provides that where permanent identification is provided for rooms and doorways, signage shall be installed on the wall adjacent to the latch side of the door. Section 4.30.6 further requires that the signage be mounted at a height of between 54 inches and 66 inches above the finished floor.²⁰ A provision has also been added that a person must be able to approach within 3 inches of the signage without encountering protruding objects or standing within the swing of a door so that individuals who must approach signage closely to read it can do so safely.

4.30.5 Finish and Contrast

UFAS provides that characters and symbols shall contrast with their background (either light characters on a dark background or dark characters on a light background). The Board proposes to include the requirement that characters shall be either light on a dark background, or dark on a light background, and to add requirements with respect to finish and contrast.

Section 4.30.5 would require that characters and background of signs be eggshell (11–19 degree gloss on 60 degree glossometer) to minimize reflectance (the degree and intensity that light reflects from surfaces) which disproportionately affects certain persons with low vision. A matte finish, although similar to eggshell in its positive characteristics, soils easily and is more difficult to clean than eggshell. Section 4.30.5 would also require that characters contrast with their background by at least 70 percent as measured by a standard comparison ratio. These provisions are consistent with the planned revisions to the ANSI A117.1 standard.

²⁰ The ANSI A117.1 standard does not presently contain a section on the mounting location and height of tactile signage; but the planned revisions to that standard are expected to include such a section which may vary slightly from the existing UFAS requirement and these proposed guidelines with respect to the minimum and maximum mounting heights.

4.30.7 Symbols of Accessibility

UFAS presently provides that accessible facilities required to be identified by 4.1 shall use the international symbol of accessibility. The Board proposes to add provisions that telephones required to be equipped with a volume control by 4.1.3(17)(b) shall be identified by a sign containing a depiction of a telephone handset with radiating sound waves; and telephones required to be equipped with a telecommunication display device or telecommunication device for the deaf (TDD) by 4.1.3(17)(c) shall be identified by the international TDD symbol. Where TDDs are required, this section would also require that directional signage displaying the international TDD symbol be placed adjacent to all single user or banks of telephones which do not contain a TDD that indicates the location of the nearest TDD.

4.30.8 Illumination Levels

The Board sponsored research project on information and signage needs of persons with low vision found that relatively uniform, diffuse general illumination is critical for people with various disabilities as well as for the general public. Ceiling mounted down lights and similar directional lighting create alternating pools of light and shadow that make it more difficult for persons with certain visual impairments to read signs. Based on tests of subjects, the research project found that optimal success at reading a variety of signs and typefaces was achieved using a lighting level of 300 lux (30 footcandles) at the sign panel itself. The ambient lighting level need not be the same. When the illumination level was reduced to 100 lux, the success rate decreased by 24 per cent; and when the level was raised to 500 lux, the success rate decreased by 9 per cent.

This section incorporates the findings of the research project and provides that illumination levels on the sign surface shall be in the 100–300 lux range and shall be uniform over the sign surface. The section further provides that signs shall be located so that the illumination level on the surface of the sign is not significantly exceeded by the ambient light or visible bright lighting source behind or in front of the sign.

4.33 Assembly Areas: Row Spacing and Lines of Sight

This section incorporates the provisions of UFAS section 4.33 relating to assembly areas. The Board seeks comments on two issues concerning seating in assembly areas.

Question 32: The first issue involves row spacing. Many people with mobility impairments find it difficult to get to mid-row seats in assembly areas such as theaters or sports arenas. Wider row spacing, with a greater distance between the edge of the seat and the back of the seat in the next row forward, would make it much easier for everyone to access mid-row seating. Building codes currently provide options in the design of seating areas. One option is to limit the number of seats in rows that have conventional narrow row spacing; and another option is to allow an increase in the allowable number of seats per row when there is a corresponding increase in the distance between rows ("continental" seating). The Board seeks comments on whether row spacing should also be addressed as an accessibility issue.

Question 33: The second issue involves lines of sight at seating locations for people who use wheelchairs. Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas. This requirement appears to be adequate for theaters and concert halls, but may not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event. In alterations of existing sports arenas, accessible spaces are frequently provided at the lower part of a seating tier projecting out above a lower seating tier or are built out over existing seats at the top of a tier providing a great differential in height. These solutions can work in newly constructed sports arenas as well, if sight lines relative to standing patrons are considered at the time of initial design. The Board seeks comments on whether full lines of sight over standing spectators in sports arenas and other similar assembly areas should be required.

4.34 Automated Teller Machines

4.34.1 General

The legislative history of the ADA specifically refers to automated teller machines (ATMs) and states that it would be a violation of title III to build a new bank with ATMs that are not readily accessible to and usable by persons with disabilities. H. Rept. 101-485, pt. 3, at 60-61. The Board proposes to include requirements for ATMs in the technical specifications with respect to controls (4.34.2); clearances and reach ranges (4.34.3); and equipment for persons with visual impairments (4.34.4).

4.34.2 Controls

4.34.3 Clearances and Reach Ranges

Section 4.34.2 states that controls for user activation shall comply with 4.27 (controls and operating mechanisms) which contains requirements for clear floor space to be provided at controls (4.27.2); the maximum and minimum heights for the placement of controls (4.27.3); and the operation of controls (4.27.4). These provisions allow flexibility in design and do not prescribe the size and arrangement of controls.

Although a clear space under ATM units would make them usable by more people, the internal configuration and placement of the safe in many units may make this difficult. Section 4.34.3 states that free standing or built-in ATM units not having a clear space under them shall provide for a parallel approach (see, 4.2.4 and Figure 4(c)) and both a forward and side reach to the unit (see, 4.2.5. and 4.2.6) allowing a person in a wheelchair to access the controls and dispensers.

Question 34: The scoping provisions in 4.1.3(20) contain an exception for drive-up-only ATMs and state that they are not required to comply with 4.34.2 and 4.34.3 because they are designed to be used from motor vehicles.²¹ However, the Board seeks additional information on reach range requirements from standard size motor vehicles.

4.34.4 Equipment for Persons with Vision Impairments

Section 4.34.4 provides that instructions and all information for use of ATMs shall be made accessible to an independently usable by persons with vision impairments. The planned revisions to the ANSI A117.1 standard may contain more specific provisions with respect to equipping ATMs for use by persons with vision impairments. The Board proposes to state the requirement in general performance terms in view of the evolving technology in this area and to allow flexibility in design. Some banks and financial institutions presently have accessible ATMs that can be used independently by persons with vision impairments, for example American Express Company and Bay Banks Systems in Waltham, Massachusetts.

Question 35: The Board seeks additional information on equipment presently in use or available technologies for making instructions and

²¹ Drive-up-only ATMs are not exempt from 4.34.4 (equipment for persons with vision impairments) because an individual with a vision impairment may be a passenger in a car and require access to and independent use of the unit.

other information relating to the use of ATMs accessible to persons with vision impairments. If a telephone handset or other listening device is used, is the equipment any more susceptible to vandalism than handsets currently used for public telephones? Are there ways that vandalism can be minimized? Can information provided on video display screens such as "deposit or withdrawal" and "checking or savings" be provided in Braille as the user presses various keys? Can receipts be made accessible by Braille or voice synthesis if a telephone handset or other listening device is used? How can screen illumination and contrast be provided in an outdoor environment where glare may be a problem?

Question 36: Whatever accommodations are made for persons with vision impairments should not preclude use by other persons with disabilities. If telephone handsets are used to convey printed and displayed information to persons with vision impairments, should a visual display be required to maintain accessibility for persons with hearing impairments? Is there a possibility that handsets would entirely replace video display screens?

Question 37: The Board also seeks comments on how privacy needs can be met in the context of accessible ATMs. For example, some video display screens and controls are mounted horizontally or at a shallow angle to prevent individuals standing behind the user from viewing the transaction. This design often makes it difficult for a user seated in a wheelchair to use the ATM. Are there other ways that privacy can be provided without rendering the equipment inaccessible? How can audio output (other than by a telephone handset) be offered to accommodate individuals with vision impairments in a private manner?

Question 38: The Board further seeks comments on what security issues, if any, should be considered relative to an individual with a disability? Are there considerations with respect to the environment around ATMs ("surround design") that may cause difficulty complying with the provisions of this section?

Question 39: Finally, the Board further seeks comments on whether other point of sale machines, such as machines selling insurance at airports or machines used for overnight delivery of letters and packages, should be covered by these guidelines. Some of these machines may require the user to fill out forms. Should such information be made accessible to persons with vision impairments? Should forms be provided in large print

and Braille? Should a typewriter keyboard be provided for completing forms? How will the user know that entries are correct?

5. Restaurants and Cafeterias

5.1 General

Section 5 provides specific requirements for restaurants and cafeterias, in addition to those contained in 4.1 through 4.34.

Question 40: Section 5.1 is based on UFAS and states that where fixed tables are provided, at least 5 percent, but not less than one, of the fixed tables shall be accessible and comply with 4.32 (seating, tables, and work surfaces). Space must be provided around accessible fixed tables to allow people who use wheelchairs to maneuver to the table. Many building codes currently require 5 percent of fixed tables to be accessible. However, the proposed BCMC scoping provisions for the ANSI A117.1 standard and recently approved revisions to the Uniform Building Code provide for 10 percent of fixed tables to be accessible. The Board seeks comments on whether the 5 percent figure is adequate or whether a higher or lower percent should be specified? What effect would the different percentages have on space layouts and revenues?

5.2 Dining Areas

Section 5.2 requires that, in newly constructed restaurants and cafeterias, raised or sunken dining areas, loggias, and outdoor seating areas must be accessible. In alterations, accessibility to raised or sunken dining areas, or to all parts of outdoor seating areas is not required provided that the same services and decorative character are provided in an accessible space usable by the general public and not restricted to use by people with disabilities.

If a restaurant is located in a building that is not required to have an elevator (see, 4.1.3(5)) and has a mezzanine, and if the area of mezzanine seating measures no more than 33 percent of the accessible seating area, then an accessible means of vertical access to the mezzanine is not required provided that the same services and decorative character are provided in an accessible space usable by the general public and not restricted to persons with disabilities. This exception does not apply to buildings required to have an elevator.

5.3 Access Aisles

Section 5.3 contains technical specifications for access aisles to accessible fixed tables.

5.4 Food Service Lines

Section 5.4 is taken from UFAS and provides technical specification for accessible food service lines. Instead of requiring a "reasonable portion" of self-service shelves to be within forward and side reach ranges (4.2.5 and 4.2.6), the Board proposes to require at least 50 percent of each type of self-service shelves to be within the required reach ranges.

5.5 Counters and Bars

Section 5.5 requires that where food or drink is served at counters exceeding 34 inches in height, a portion of the counter shall comply with 4.32 (seating, tables, and work surfaces) or service shall be available at accessible tables within the same area.

5.6 Tableware and Condiment Areas

Section 5.6 requires that self-service shelves and dispensing devices for tableware, dishware, condiments, food and beverages be installed to comply with 4.2 (space allowance and reach ranges).

5.7 Raised Platforms

Section 5.7 requires that a raised platform used for the head table or speaker's lectern in banquet rooms or spaces shall be accessible by means of a ramp or platform lift complying with 4.8 or 4.11, respectively. Open edges of a raised platform must be protected by the placement of tables or by a curb.

5.8 Vending Machines and Other Equipment

Section 5.8 requires that locations for vending machines and other equipment be on an accessible route and that the vending machines and equipment be installed to comply with 4.2 (space allowances and reach range) and 4.27 (controls and operating mechanisms).

6. Medical Care Facilities

6.1 General

These sections establish specific requirements for medical care facilities, in addition to those contained in 4.1 through 4.34. The provisions are taken from UFAS but the overall title of the section is designated medical care facilities instead of health care facilities to avoid confusion with the term "professional office of a health care provider" that is used elsewhere in the ADA. The sections apply to medical care facilities such as hospitals where persons may need assistance in responding to an emergency and where the period of residence may exceed twenty-four hours. Doctors' and dentists' offices are not included.

Section 6.1 contains a table incorporating scoping provisions from UFAS section 4.1.4(9)(b). With respect to patient bedrooms and toilet rooms, general purpose hospitals, psychiatric facilities, and detoxification units must have at least 10 percent of such rooms accessible; long term care facilities and nursing homes must have at least 50 percent of such rooms accessible; and hospitals that specialize in treating conditions affecting mobility must have all of such rooms accessible. In addition, all public use, common use, and employee use areas in each type of medical care facility must be designed and constructed to be accessible. Although section 6.1 requires only a percentage of patient bedrooms in certain types of medical care facilities to be accessible, all patient bedrooms are also employee areas and would have to be designed and constructed so that a doctor, nurse, or other health care personnel with a disability can approach, enter, and exit the rooms. See, section 4.1.1(3) for additional discussion.

Question 41: The medical care facilities listed in the table are meant to be illustrative. If a specific medical care facility is not mentioned in the table, it is required to meet the requirements for the type of facility that it most closely resembles. The Board seeks comments on whether there are specific medical care facilities which are different from the types listed in the table and whether they should be included in the table.

6.3 Patient Bedrooms

6.4 Patient Toilet Rooms

These sections are taken from UFAS and contain technical specifications for accessible patient bedrooms and accessible patient toilet rooms.

7. Business and Merchantile

7.1 General

These sections contain specific requirements for all areas used for business transactions with the public, and are in addition to those in 4.1 through 4.34.

7.2 Sales and Service Counters, Teller Windows, Information Counters

Section 7.2 requires that where counters exceeding 36 inches in height are provided for sales or distribution of goods or services to the public, a portion of the main counter must be provided with a maximum height of between 24 inches and 34 inches above the floor. In alterations, where it is technically infeasible to provide an accessible portion of the main counter, an auxiliary

counter meeting the accessible height requirements may be provided.

Question 42: The Board seeks comments regarding how this provision should be applied where services are provided at several points along a counter such as teller stations in a bank or ticketing areas at an airport. Should a portion of the counter at each teller station or ticketing area be accessible or should only a percentage of the teller stations or ticketing areas meet the requirement?

7.3 Check-Out Aisles

UFAS provides that at least one check-out aisle must be accessible where check-out aisles are provided. Accessible check-out aisles must have a clear aisle width complying with 4.2.1 (wheelchair passage width) and a maximum adjoining counter height not exceeding 36 inches above the floor.

The Board proposes to require that all check-out aisles be accessible for several reasons. First, the requirement for at least one accessible check-out aisle has been unsatisfactory because the accessible check-out aisle is not always open or equipment may be broken. Second, check-out aisles are used in different ways. For instances, some check-out aisles serve as express lines for customers purchasing small number of items (e.g., "10 items or less"). Some check-out aisles accept only cash transactions while others also accept checks and credit cards. The reports of the House Education and Labor Committee and the House Judiciary Committee generally recognize that the extent to which identical features should be accessible depends on whether they will be used in different ways. H. Rept. 101-485, pt. 2, at 118; H. Rept. 101-485, pt. 3, at 61. The former report, but not the latter, states that "all check-out lanes in a supermarket should be sufficiently wide to allow passage by individuals who use wheelchairs." H. Rept. 101-485, pt. 2, at 118. See also, statement of Congressman Morrison at 136 Cong. Rec. H. 2825 (May 22, 1990) ("checkout stands can have different functions * * * requiring all checkout stands to be accessible is not burdensome and achieves the necessary degree of accessibility").

Question 43: Third, in new construction of many facilities, the Board expects that all check-out aisles can be designed and constructed to be accessible with only minor variations from what is considered the "typical" design and little or no increase in overall square footage. For instance, cashiers' stations can be staggered front-to-back, as they are currently in some discount stores; or two narrow

check-out aisles can be combined into a double-wide aisle served by cashiers on both the right and left sides of the aisle. The Board seeks information relating to the experience of stores which have utilized these designs to provide wider check-out aisles. Do the designs present additional security considerations and, if so, in what ways have those considerations been successfully addressed? What is the net effect of the staggered front-to-back design on overall square footage?

7.4 Security Ballards

Section 7.4 is taken from UFAS and states that devices used to prevent the removal of shopping carts from store premises shall not prevent access or egress for persons who use wheelchairs. An alternative entry that is equally convenient to that provided for the general public is acceptable.

8. Libraries

8.1 General

These sections are all taken from UFAS without change and provide specific requirements for the design of all public areas of libraries, including reading and study areas, stacks, reference rooms, reserve areas, and special facilities and collections. They are in addition to the requirements contained in 4.1 through 4.34.

8.2 Reading and Study Areas

Section 8.2 requires that at least 5 percent, or a minimum of one, of each element of fixed seating, tables, or study carrels must comply with 4.2 (space allowance and reach ranges) and 4.32 (seating, tables, and work surfaces). Clearances between fixed accessible tables and study carrels must comply with 4.3 (accessible route).

8.3 Check-Out Areas

Section 8.3 requires that at least one lane in each check-out area must comply with 4.32 (seating, tables, and work surfaces). Any traffic or book security gates or turnstiles must comply with 4.13 (doors).

8.4 Card Catalogs

Section 8.4 requires that card catalogs, magazine displays, and reference stacks provide a 36 inch minimum clear aisle space and a maximum reach height complying with 4.2 (space allowances and reach ranges). A height of 48 inches is preferred, regardless of reach allowed.

8.5 Stacks

Section 8.4 requires a 36 inch minimum clear aisle width between stacks. A width of 42 inches is preferred

where possible. Shelf height in stack areas is unrestricted.

9. Accessible Transient Lodging

The ADA specifically includes inns, hotels, motels, or other places of lodging, and homeless shelters in the categories of public accommodations. For purpose of these guidelines, those public accommodations are called "transient lodging." As defined in section 3.5, "transient lodging" may contain one or more sleeping accommodations (i.e., rooms in which people sleep as in most hotels) or dwelling units (i.e., a unit with a kitchen or food preparation area in addition to rooms and spaces for living, bathing, and sleeping as in many resorts). As used in these guidelines, the term "dwelling unit" does not include any unit that is used as a residence because such units are generally covered by the Fair Housing Amendments Act of 1988 and not the ADA.

Section 9 contains specific requirements for transient lodging which are in addition to those contained in sections 4.1 through 4.34, and sections 5 and 7.

9.1 Hotels, Motels, Inns, Boarding Houses, Dormitories, Resorts and Other Similar Places of Transient Lodging

Section 9.1 applies to hotels, motels, inns, boarding houses, dormitories, resorts and other similar places of lodging. This section contains scoping provisions and requires all public and common use areas to be accessible. The section also requires five percent of each class of sleeping rooms or suites to be fully accessible and an additional five percent to provide accommodations for persons with hearing impairments.

The section further requires that all doors and doorways intended for passage into and within any sleeping room or suite, whether or not the room or suite is fully accessible, provide adequate clear width complying with 4.13.5 for persons using wheelchairs. Maneuvering clearances are required only in fully accessible rooms and suites. This latter requirement is based on the legislative history of the ADA. See, section 9.4 for additional discussion.

The section includes an exception based on the statute that these requirements do not apply to an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as a residence.

UFAS, the Uniform Building Code, and proposed BCMC scoping provisions

for the ANSI A117.1 standard all require five percent of sleeping rooms to be accessible to persons with mobility impairments. Many States which have accessibility provisions for transient lodging also require four to five percent of sleeping rooms be accessible. An analysis of demographic data reveals that there are at least as many persons with hearing impairments as there are persons with mobility impairments. In 1988, the Board sponsored research on the need for accessibility. The project report, which is titled *Persons Who Need or Benefit From Accessibility Features In the Built Environment*, includes the following statistics:

- 1,341,000 individuals are reported to use a wheelchair and/or walker (National Health Institute Services, *Home Care Supplement: 1980*);
- 5,191,000 individuals are unable to walk up a flight of stairs (Bureau of Census, *Disability Functional Limitation and Insurance Coverage: 1984-85*);
- 1,741,000 individuals are deaf in both ears (National Institute on Disability and Rehabilitation Research, *Data on Disability from the National Health Interview Survey: 1983*); and
- 7,694,000 individuals have difficulty hearing what is said in a normal conversation with another person, including those who cannot hear at all (Bureau of Census, *Disability Functional Limitation and Insurance Coverage: 1984-85*).

Other studies indicate that a greater percentage of individuals have a hearing impairment. For example, the National Center for Health Statistics found a 7.9 percent rate. *National Health Interview Survey, 1979-80*. Based on this data and the ADA's mandate that the Board provide greater guidance with respect to communication accessibility, the Board has proposed to establish equivalent scoping provisions for persons with mobility impairments and persons with hearing impairments.

Question 44: The requirement that a percentage of each "class" of sleeping rooms or suites meet the accessibility requirements is based on the legislative history. H. Rept. No. 101-485, pt. 2, at 118. The Board seeks comments on how the term "class" should be defined.

9.2 Accessible Units, Sleeping Rooms and Suites

9.2.1 General

9.2.2 Minimum Requirements

These sections contain the technical specifications for fully accessible units, sleeping rooms and suites. Many of the provisions are consistent with those recommended by the American Hotel and Motel Association (AHMA) in its

"Interpretation of ANSI A117.1 (1986) as Applicable to New Hotels and Motels." Each fully accessible unit, sleeping room or suite must be located on an accessible route, even if a building is exempt from the elevator requirement under section 4.1.3(5). Thus, in a building without an elevator, all fully accessible units, sleeping rooms and suites must be located on the accessible ground floor. Fully accessible units, sleeping rooms or suites must have the following accessible elements and spaces:

- Maneuvering space complying with 4.2.3 (wheelchair turning space) along at least one side of at least one bed;
- An accessible route complying with 4.3 to connect all accessible spaces and elements, including telephones, within the unit, sleeping room or suite;
- Doors and doorways complying with 4.13 to allow passage into and within the unit, sleeping room or suite;
- Storage (e.g., cabinets, shelves, closets and drawers) complying with 4.25;
- Controls (e.g., thermostats and lights) complying with 4.27; and
- Accommodations for persons with hearing impairments complying with 9.3.

At least one sleeping area and one full bathroom with a water closet, lavatory, and a bathtub or shower must be accessible in each fully accessible unit, sleeping room or suite. If only half bathrooms (without bathtub or shower) are provided, then at least one half bathroom must be accessible. Where a living area, dining area, patio, terrace, balcony, carport, garage or parking space is provided, each such area or space must be accessible. Where kitchens, kitchenettes, wet bars, or similar amenities are provided, those areas or features must also be accessible. Section 9.2.2(7) contains technical specification for kitchens, kitchenettes, and wet bars and are consistent with UFAS and the ANSI A117.1 standard for clear floor area, reach ranges, and mounting height.

Question 45: Some people who use wheelchairs can transfer from a wheelchair to a bed on only one side or the other, not both. The Board seeks comments on whether maneuvering space should be required along either side of a bed to accommodate these individuals? This maneuvering space can be provided with one space between two beds.

Question 46: The Board also seeks comments on several issues relating to bathrooms:

(a) Consistent with UFAS and the ANSI A117.1 standard, section 4.20.4 of the guidelines requires that dual horizontal grab bars be provided in accessible bathtubs. These bars may be

too low for people who stand in the shower but have limited balance and need grab bars to prevent falls. Some hotels place a vertical grab bar adjacent to the shower head to prevent falls by people who stand. Should a vertical grab bar be required in addition to the dual horizontal grab bars?

(b) Consistent with UFAS and the ANSI A117.1 standard, sections 4.20.8 and 4.21.6 of the guidelines require that a shower spray unit with a hose at least 60 inches long which can be used as a fixed shower head or as a hand held shower be provided in accessible bathtubs and accessible shower stalls. The shower spray unit is usually attached to a hook on an adjustable vertical bar. The mounting location of the hook is often too high to be reached by people who use wheelchairs. Should two mounting hooks be provided: one mounted at a height for people who stand and one mounted at a height for people who sit to take a shower?

(c) Consistent with UFAS and the ANSI A117.1 standard, section 4.21.2 of the guidelines allow two sizes of accessible shower stalls. One shower stall is 36 inches by 36 inches with a maximum $\frac{1}{4}$ inch curb height (Figure 35(a)). The other shower stall is the same size as the space required for a bathtub (30 inches by 60 inches) and can have a $\frac{1}{4}$ inch leveled edge or change in level (1:50 slope) as allowed on an accessible route (Figure 35(b)). The smaller shower stall requires a shower seat to be installed; however, some people who use wheelchairs have difficulty transferring from a wheelchair to the seat. The larger shower stall is more usable. Should at least one of the larger shower stalls be required? If at least one of the larger shower stalls is required, should a fold-up shower seat be installed to accommodate persons who do not use a wheelchair but need to sit down in the shower? Some people find shower seats too slippery to use. Should there be a requirement that shower seats must be slip-resistant? Should the shower control mechanism be allowed in the center of the long side wall as in the 1986 version of the ANSI A117.1 standard?

(d) Consistent with UFAS and the ANSI A117.1 standard, section 4.16.4 of the guidelines requires grab bars to be provided on the long wall beside the toilet and on the rear wall. This leaves one side of the toilet open to permit a side transfer from a wheelchair. However, some people with disabilities who use mobility aids such as a walker, cane or crutches require grab bars on both sides of the toilet to assist in returning to a standing position. A

possible way to accommodate these individuals is to provide a movable grab bar on the open side of the toilet. See discussion under section 4.17, question 28 for a fuller discussion of movable grab bars. Should a movable grab bar be required on the open side of the toilet to provide accommodation for a wider range of persons with disabilities?

9.3 Sleeping Room Accommodations for Persons With Hearing Impairments

This section specifies the features that must be provided in units, sleeping rooms, or suites required to accommodate persons with hearing impairments. Visual alarms complying with 4.28.4 must be provided. Visual notification devices must also be provided to alert occupants of incoming telephone calls and door knocks or bells. The visual notification device may not be connected to the visual alarm signal device. If a permanently installed telephone is provided, it must be equipped with a volume control.

Question 47: Both portable and built-in visual alarms and visual notification devices are commercially available. AHMA recommends that visual alarm devices be made available to guests upon request. The Board seeks information regarding the effectiveness and usability of portable devices as compared to built-in devices.

9.4 Other Sleeping Rooms and Suites

This section implements the legislative history of the ADA which states that, with respect to hotels, accessibility includes "requiring all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs." H. Rept. 101-485, pt. 2, at 118.

9.5 Transient Lodging in Homeless Shelters, Halfway Houses, Transient Group Homes, and Other Social Services Establishments

9.5.2 Alterations (Reserved)

9.5.3 Accessible Sleeping Accommodations (Reserved)

These sections concern homeless shelters, halfway houses, transient group homes, and other social service establishments that provide transient lodging. The operation of these establishments is significantly different from that of hotels, motels, inns, boarding houses, dormitories, and resorts. For example, these establishments have significant responsibility for serving various vulnerable populations and persons with disabilities. In addition, the nature

and extent of services provided may differ substantially. For this reason, the Board has addressed these establishments separately.

Question 48: Section 9.5.1 requires that in new construction all public use and common use areas must be accessible. At least one of each type of amenity in each common area such as washers, dryers, and similar equipment installed for the use of occupants must be accessible and located on an accessible route to any accessible unit or sleeping accommodation. The Board seeks comments regarding whether these requirements are necessary or appropriate in homeless shelters and similar establishments if at least one of each type of amenity is available in an accessible common area.

Question 49: The Board has reserved section 9.5.2 regarding alterations. Unique problems may arise when homeless shelters and similar establishments are placed in existing facilities originally designed for different purposes. Such changes of occupancy may affect the location of services provided. The Board seeks comment on what scoping provisions should apply in these situations taking into consideration such factors as the needs of the populations served, service availability, and the significant demand for these important and scarce facilities. The Board expects to include requirements in the final rule.

Question 50: The Board has also reserved section 9.5.3 regarding accessible sleeping accommodations and is considering requiring five percent of sleeping accommodations, but not less than one, to be fully accessible and an additional two percent to accommodate persons with hearing impairments. The two percent requirement is the same as established by the Department of Housing and Urban Development in its regulations implementing section 504 of the Rehabilitation Act of 1973. 24 CFR 8.22(b). The Board seeks comments on this scoping issue and the potential effects on the operation of affected establishments. The Board expects to include requirements in the final rule.

10. Transportation Facilities (Reserved)

The Board intends to issue a supplemental notice of proposed rulemaking (SNPRM) with respect to transportation facilities.

Other Issues

Standards for Recreation

The legislative history of the ADA refers to a technical paper developed in

1985 on "Access to Outdoor Recreational Planning and Design" and directs the Board to issue guidelines for accessible recreation facilities. H. Rept. 101-485, pt. 2, at 139. "Access to Outdoor Research Planning and Design" addresses access to trails, picnic areas, and campsites. Currently, the Board is working with the U.S. Forest Service, the National Park Service, and other federal agencies with recreation responsibilities in the development of comprehensive guidelines which will further address such issues as boating access, water access at beaches, fishing piers, and horseback riding, among others. Though these more comprehensive guidelines are being developed as part of responsibilities under section 504 of the Rehabilitation Act of 1973 and the Architectural Barriers Act of 1968, the Board believes that requirements for privately owned and funded recreational facilities, as well as those covered under Title II, should be consistent where possible with the guidelines under development. The Board is awaiting the publication of these guidelines so that the product of this effort can be considered in the development of accessibility guidelines for recreation facilities covered by the ADA.

Question 51: The Board seeks information regarding any existing standards and technologies with respect to access to recreation facilities, as well as suggestions for facilities that may require additional standards such as amusement parks, tennis courts, racquetball courts, and gymnasiums.

Swimming Pools

Question 52: Swimming pools, hot tubs, and spas are either public use or common use areas, depending on whether they are made available to the general public or for the use of a restricted group of people such as occupants of a hotel or motel. Many state and local building codes, as well as a variety of recommended guidelines, require some form of accessibility to swimming pools. The means that are generally allowed include ramps, pool lifts (hydraulic, pneumatic or electric), transfer tiers, raised pool edge coping, and movable pool floors. The Board seeks information regarding the relative usefulness and the costs associated with each of these various means. Is there a means of access that is usable by all persons with mobility impairments? If not, should more than one system be required? Which would provide the greatest level of accessibility to most individuals? If pool lifts are provided, should there be a requirement that they

be independently operable by an individual with a disability?

Exercise Equipment

Question 53: The Board is considering addressing fixed or built-in exercise equipment and seeks the following information: How can exercise equipment be made more accessible? What accessible equipment is currently available? What are the costs associated with modifying existing equipment so that it is accessible? Can modified equipment also be used by the general public?

Dressing and Fitting Rooms

Question 54: The Board has received numerous requests for interpretations with respect to applying UFAS to dressing and fitting rooms suggesting that these spaces should be specifically addressed in the ADA guidelines. Dressing and fitting rooms occur in many different types of buildings and facilities covered by the ADA, such as health spas, swimming pools, clothing stores, x-ray labs and other health care facilities. For scoping provisions, the Board is considering requiring that if one or more dressing or fitting rooms are to be provided for the use of general public, patients, customers, or employees, then five percent, but never less than one, at each dressing and fitting room location would have to be accessible. For technical specifications, the Board is considering applying pertinent existing provisions regarding sizes of doors and maneuvering space; to use existing anthropometric data to develop provisions for the necessary amenity of a bench; and to incorporate a provision for slip resistance based on the results of current research for slip resistance of floors (see, section 4.5 for additional discussion of research). The Board seeks comments and information regarding the appropriateness of including requirements for dressing and fitting rooms in the ADA guidelines and whether the suggested provisions would meet the needs of individuals with disabilities without absorbing too much square footage.

State and Local Government Buildings

Question 55: Title II of the ADA covers State and local government buildings. Section 504 of the ADA requires that the Board also issue accessibility guidelines for these buildings. Many newly constructed or altered State and local government buildings are designed or altered consistent with the UFAS under current regulations issued under section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of federal

financial assistance. However, the ADA requirements for newly constructed and altered State and local government buildings differ in some aspects from those for places of public accommodation and commercial facilities. For example, the exceptions for structural impracticability in new construction and for elevators in newly constructed or altered facilities that are less than three stories or have less than 3,000 square feet per story do not apply to State and local government buildings. The Board seeks comments on several issues relating to State and local government buildings for purposes of developing its accessibility guidelines.

Question 56: State and local government courthouses are covered by title II of the ADA. The Board requests information on courthouses which provide access to jury boxes, witness stands, and judges' benches. Should the Board's guidelines cover these features?

Question 57: State and local government detention and correctional facilities are also covered by title of the ADA. UFAS section 4.1.4(9)(c) requires that 5 percent of residential units available, but not less than one, must be accessible. The Board seeks comments on the experience of detention and correctional facilities in complying with this provision. The Board also seeks comments on other State and local government buildings which may require particular attention. For example, if a firehouse has a second story which is used only for sleeping accommodations and does not contain any office space, should there be an exception from the requirement for elevators?

Question 58: With respect to scoping provisions, should State and local government buildings be required to provide a higher degree of accessibility than places of public accommodation and commercial facilities. For example, should all entrances to newly constructed State and local government buildings be accessible? Should a greater number of accessible telephones and telecommunication display devices or telecommunication devices for the deaf (TDDs) be required in State and local government buildings? Should swimming pools operated by State or local government entities provide more than one means of water access, since not all means of providing access are equally useful for people?

Question 59: In the case of alterations, UFAS section 4.1.6(3) establishes additional requirements for an accessible route, an accessible entrance, and accessible toilet facilities when the total cost of all alterations within any twelve month period amounts to 50 percent or more of the full and fair cash

value of the building. Should this requirement be replaced by one similar to that established for alterations to places of public accommodation and commercial facilities under title III of ADA? That requirement would provide where alterations affect or could affect usability of or access to an area of a facility containing a primary function, the entity shall make the alteration in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area are accessible to the extent that the costs of these accessibility features are not disproportionate to the overall alterations in terms of cost and scope or determined under criteria established by the Attorney General. Title II of the ADA contains a similar requirement for publicly operated transit facilities but not for other State and local government buildings.

Regulatory Process Matters

These guidelines are issued to provide guidance to the Department of Justice in establishing accessibility standards for new construction and alterations in places of public accommodation and commercial facilities as required by the ADA. The standards established by the Department of Justice must be consistent with and may incorporate these guidelines. These guidelines, when considered together with regulations to be issued by the Department of Justice, meet the criteria for a major rule under Executive Order 12291. The Board has prepared a Preliminary Regulatory Impact Analysis (PRIA) which has been placed in the docket and is available for public inspection at the Board's office. The PRIA includes a summary of state accessibility requirements; a qualitative and quantitative discussion of the benefits of accessibility; a cost impact analysis for certain accessibility elements; and a discussion of the regulatory alternatives considered.

Question 60: The Board seeks comments on the approaches and data used to estimate the potential benefits and costs of the guidelines. In particular, the Board is interested in any empirical data or existing analyses that may shed light on these matters. Any such information, where relevant, will be incorporated into the Final Regulatory Impact Analysis.

Accessibility does not generally add features to a building or facility but rather simply requires that features commonly provided have certain characteristics. Some of the characteristics may add marginally to

the cost of an element; however, the cost for installation are not usually increased. In addition, accessibility generally adds little or no space to buildings and facilities. Several studies discussed in the PRIA have shown that designing buildings and facilities to be accessible, from the conceptual phase onward, adds less than 1% to the total construction costs. For purposes of the PRIA, the Board analyzed the cost impact of accessibility elements which had potential of adding to the cost of a building or facility. Included in the analysis were: area of refuge; parking (signage); curb ramps (detectable warnings); ramps (handrail extensions and edge protection); stairs (handrail extensions); detectable warnings; elevators (raised characters on hoistway entrances, reopening devices, tactile and braille control indicators, and audible signage for car position); water closets and toilet stalls (grab bars); lavatories and sinks (insulation of hot water and drain pipes); bath tubs and shower stalls (seat, grab bars, and hand-held showers); alarms (visual systems); signage (tactile and braille characters); telephones (volume controls, TDDs and TDD signage); assembly areas (assistive listening systems); automated teller machines (ATMs) (equipment for persons with visual impairments); and visual notification devices.

Unit costs were developed for including each of the accessibility elements in newly constructed facilities and applied to a variety of building types differing in both size and type. The direct costs by building size and type for the accessibility elements are estimated as follows:

NEW CONSTRUCTION

Building type	Cost	Cost/ square feet	Percent of new con- struction cost
High-rise Office.....	\$88,810	.12	.145
Low-rise Office	21,997	.09	.14
High-rise Hotel.....	147,212	.33	.47
Low-rise Hotel	76,030	.56	.79
Auditorium	12,029	.50	.61
Movie Theater	7,750	.65	.92

The PRIA also discusses the indirect costs of the accessibility elements such as maintenance, operation and opportunity costs. Space allocation and re-allocation issues are analyzed with respect to maneuvering space in corridors: the standard toilet stall versus the alternate toilet stall; check-out aisles; and areas of refuge.

As for regulatory alternatives, section 504 of the ADA specifically requires that

the guidelines "supplement the existing [MGRAD]" on which the current UFAS is based and "establish additional requirements, consistent with this Act, to ensure that buildings [and] facilities * * * are accessible, in terms of architecture and design, * * * and communication, to individuals with disabilities." The legislative history states that the guidelines may not "reduce, weaken, narrow, or set less accessibility standards than those included in existing MGRAD" and should provide greater guidance in the area of communication accessibility for individuals with hearing and visual impairments. As mandated by the statute, the guidelines use MGRAD and UFAS as their base or floor. The PRIA discusses regulatory alternatives considered for major provisions which go beyond MGRAD and UFAS. These include provisions for areas of refuge; volume controls for public telephones; telecommunications display devices or telecommunication devices for the deaf (TDDs); detectable warnings; assistive listing systems; signage; and automated teller machines (ATMs).

In addition to the analysis described above, the Board is exploring the benefits of accessibility to all building users. For example, steps represent a potential accident site. Their elimination would reduce the risk of personal injury and may also mean easier access to buildings for those carrying goods or equipment, young children, elderly people, pregnant women, and people pushing carts or baby carriages.

The Board is also interested in real estate market factors and the impact of accessibility on the marketability of space. Commercial real estate agents contacted by the Board have reported it to be an important factor. The Board plans to work with national associations representing real estate professionals and developers to obtain additional information on this topic for inclusion in the Final Regulatory Impact Analysis.

The guidelines considered together with the Department of Justice's regulations may have a significant impact on a substantial number of small entities. This impact is required by section 303 of the ADA which mandates that all new construction and alterations in places of public accommodations and commercial facilities be accessible to individuals with disabilities. Because the Board is required by Section 504 of the ADA to use MGRAD and UFAS as the base or floor for the guidelines, a Regulatory Flexibility Analysis has not been prepared.

Wherever possible, the Board seeks empirical data regarding the benefits

and costs of the guidelines with respect to small entities. The ADA includes provisions which minimize the impact on small entities. For instance, section 303(b) exempts newly constructed and altered facilities that are less than three stories or have less than 3,000 square feet per story from the elevator requirement unless the building is a shopping center, a shopping mall, the professional office of a health care provider, or another type of facility determined by the Attorney General to require the installation of an elevator based on usage. Section 303(a)(2) requires additional accessibility features to be provided when an entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function only to the extent that the features are not disproportionate to the overall alterations in terms of cost and scope as determined under criteria established by the Attorney General. Other recently enacted legislation will facilitate compliance by small entities with the ADA. As amended in 1990, the Internal Revenue Code allows a deduction of up to \$15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed \$1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing auxiliary aids, and acquiring or modifying equipment or devices.

The guidelines do not preempt State and local regulation of the construction and alteration of places of public accommodation and commercial facilities. Section 308(b)(1)(A)(ii) of the ADA permits State and local governments to apply to the Attorney General for certification that a State or local building code meets or exceeds the accessibility requirements of the ADA. Accordingly, a Federalism assessment is not necessary.

Finally, the guidelines do not have any significant impact on the environment.

DEPARTMENT OF TRANSPORTATION

49 CFR Part 27

[Docket 47192; Notice 90-28]

RIN 2105-AB53

Transportation for Individuals With Disabilities

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Final rule; request for comments.

SUMMARY: The Department is revising its regulation to implement section 504 of the Rehabilitation Act of 1973, as amended, and section 18 of the Urban Mass Transportation Act of 1964, as amended, to be consistent with a court decision invalidating a portion of that rule. This rule is also responsive to comments on a March 1990 NPRM on this subject.

DATES: This rule is effective November 19, 1990. Comments should be received by November 5, 1990. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to Docket Clerk, Docket No. 47192, Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Room 4107. For the convenience of persons who will be reviewing the docket, it is requested that commenters provide duplicate copies of their comments. Comments will be available for inspection at this address Monday through Friday from 9 a.m. through 5:30 p.m. Commenters who wish the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date-stamp the postcard and mail it to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th St., SW., Room 10424, Washington, DC 20590. Telephone 202-366-9306 (voice); 202-755-7687 (TDD). For UMTA-related questions, Susan Schrueth, Office of Chief Counsel, Urban Mass Transportation Administration, 400 7th Street, SW., Washington, DC 20590, Room 9316, 202-366-4011. Taped copies of the NPRM are available on request.

SUPPLEMENTARY INFORMATION:

Background

Since 1977, the Department has issued a series of regulations to implement section 504 of the Rehabilitation Act of

1973, section 18 of the Urban Mass Transportation Act, and related statutes with respect to mass transit services for persons with disabilities. A 1977 Urban Mass Transportation Administration (UMTA) regulation required Federally-funded transit authorities to make "special efforts" to provide transportation services to such persons. In 1979, the Department replaced the 1977 rule with a regulation to require the purchase of accessible buses and the retrofit of rail mass transit systems for accessibility. In a suit brought by the transit industry, the courts found that the 1979 rule exceeded the Department's authority under section 504 by imposing undue financial burdens on transit authorities.

In 1981, in response to this court decision, the Department published an interim final rule that, in effect, revived the 1977 "special efforts" approach. Responding to concerns that service provided by transit authorities under this rule was inadequate, Congress added a new section 16(d) to the UMTA Act in 1983. The new section did not require equal access to transit for disabled persons or even comparable service. It did require the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

The Department issued a rule to implement this statute in 1986. The rule contained six service criteria. In addition, to avoid the "undue burdens" problem that had resulted in the demise of the 1979 rule, the rule included a "cost cap". The cost cap provided that a transit authority did not have to spend more than three percent of its operating budget to comply with the rule, even if, as a result, the transit authority did not fully meet all the service criteria.

Last year, the U.S. Court of Appeals for the Third Circuit determined that, while it was appropriate for the Department to take costs into account in formulating the rule, the three percent cost cap mechanism was arbitrary. The court directed the Department to revise the rule consistent with its opinion. The rule remains in effect pending the promulgation of a new final rule. Under a court-specified schedule, the Department agreed that a final rule would be issued by September 21, 1990.

Meanwhile, consistent with the Department's commitment to implementing the policies embodied in the ADA, then under consideration by Congress, the Department proposed to replace the existing mass transit regulation with one that adopted these policies (55 FR 11120; March 28, 1990). This NPRM covered requirements for the acquisition of accessible vehicles,

provision of supplemental paratransit service, alternative mechanisms for dealing with undue financial burdens of supplemental paratransit, and administrative provisions. The NPRM specifically noted that one alternative that the Department retained was to modify the existing section 504 rule simply by deleting the "cost cap" provision, which would fully meet the Department's legal obligations under the court decision.

On July 26, 1990, President Bush signed the ADA. As discussed in the preamble of the final rule establishing 49 CFR part 37, also published in today's *Federal Register*, the Department is issuing a final rule at this time to carry out the accessible vehicle acquisition requirements of the ADA and related requirements. That final rule also responds to comments on the March 1990 NPRM on these accessibility issues. Other issues on which comment was sought in the March 1990 NPRM (i.e., supplemental paratransit, undue financial burden, public participation) will be incorporated in a new NPRM, to be published subsequently, to implement the remainder of the ADA's transportation provisions.

The Final Rule

In view of these developments, the Department has decided to meet its obligation to the courts to modify its existing section 504 rule by issuing this final rule, amending 49 CFR part 27. This amendment has three major provisions.

A. The Cost Cap

This rule deletes the three percent "cost cap," the provision of the rule which the courts invalidated. The effect of this amendment will be to require any UMTA recipient electing to meet its part 27 obligations through a special service system to meet all service criteria, regardless of the cost of doing so.

Relatively few comments to the March 1990 NPRM addressed the issue of whether the option of removing the cost cap was a good one. Four transit authorities supported the idea, and one disability group opposed it (it appears that the latter commenter's objections are largely mooted by the enactment of the ADA, the promulgation of 49 CFR part 37, and the maintenance of effort provisions discussed below).

B. Maintenance of Effort

Under part 27, a recipient has the discretion, after following public participation procedures and obtaining UMTA approval of a significant program amendment, of switching its mode of compliance. For example, a recipient

complying with the rule through a special service system can decide, instead, to comply through an accessible bus system. Faced with an ADA requirement to purchase accessible buses and an amended part 27 that removes the cost cap, a recipient may have considerable incentive to make just such a change.

A switch of this sort, which is permitted under part 27, could have one notable negative effect. A recipient which complies with part 27, as it stands now, through an accessible bus system need not maintain any special service system. Therefore, a recipient which made this change could abandon or severely cut back its special service system, only to have to rebuild it when the supplemental paratransit requirements of the ADA become effective in early 1992. Such a course of action would be both inefficient in terms of use of resources and very disruptive of existing service patterns in the meantime. For recipients with little current accessible bus service, it would also mean a significant service gap to disabled passengers.

To prevent this negative effect, this rule adds a "maintenance of effort" provision. This provision requires any recipient which now complies with part 27 through a special service system, and wishes to switch to an accessible bus system as its mode of compliance, to maintain at least its existing level of special service pending the effective date of ADA supplemental paratransit requirements. The same requirement would apply to the special service component of a mixed system.

C. Compliance With ADA Requirements and UMTA Policy

The Department believes that, for transit providers receiving UMTA funds, compliance with requirements under ADA is essential to compliance with nondiscrimination obligations under section 504 as well. Consequently, a provision is being added to part 27 to make compliance with the Department's ADA rule a condition of receiving UMTA financial assistance. For example, an UMTA-assisted transit authority that fails, after August 25, 1990, to issue solicitations calling for new accessible buses, would be in violation of part 27 as well as the Department's ADA rule, and would be subject to funding sanctions under part 27.

This provision also tells UMTA recipients to notify UMTA if they intend to purchase inaccessible vehicles on the basis of solicitations issued before the August 26, 1990, effective date for purchase of accessible vehicles under

the ADA (e.g., a solicitation issued some years ago and under which extensions or new orders of buses may be made today). This information is required to facilitate UMTA's policy concerning the participation of UMTA financial assistance in the purchase of inaccessible vehicles. This policy, consistent with the Administration's support of the ADA bills, antedated the enactment of the ADA. UMTA has taken the position, under its discretionary grant authority, that it will no longer allow UMTA funds to participate in the acquisition of inaccessible buses and other vehicles, subject to review on a case-by-case basis.

Regulatory Process Matters

This rule is not a major rule under Executive Order 12291. It is a significant rule under the Department's Regulatory Policies and Procedures. There are not sufficient Federalism impacts to warrant a Federalism assessment. The Department certifies that there are not significant economic effects on a substantial number of small entities.

The maintenance of effort provision and the provision linking compliance with the ADA to compliance with part 27 were not part of the March 1990 NPRM. The Department is issuing these provisions as final rules at this time. Without the maintenance of effort provision, the removal of the cost cap could result in the negative consequence outlined above. The removal of the cost cap is necessary at this time in order to comply with the mandate of the court. Without the link between part 27 and ADA compliance, UMTA would not have an effective sanction mechanism for any recipients which failed to comply with ADA requirement. These reasons satisfy the Administrative Procedure Act's provision that a rule may be issued without prior opportunity for comment if such an opportunity would be unnecessary, impracticable, or contrary to the public interest. However, the Department is requesting comment on these two provisions for 30 days. If comments provide sufficient reason for doing so, the Department will modify the provisions prior to the effective date of this amendment.

List of Subject in 49 CFR Part 27

Mass transportation, Handicapped.

Issued this 28th day of September 1990, at Washington, DC.

Samuel K. Skinner,

Secretary of Transportation.

For the reasons set forth in the preamble, 49 CFR part 27 is amended as follows:

PART 27—(AMENDED)

1. The authority citation for 49 CFR part 27 continues to read as follows:

Authority: Sec. 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794); sec. 16(a) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1612(a)); sec. 165(b) of the Federal-aid Highway Act of 1973 (49 U.S.C. 142 note). Subpart E is also issued under sec. 317(c) of the Surface Transportation Assistance Act of 1982 (49 U.S.C. 1612(d)).

2. The Table of Contents for subparts A and E of 49 CFR part 27 is revised to read as follows:

Subpart A—General

Sec.

- 27.1 Purpose.
- 27.3 Applicability.
- 27.5 Definitions.
- 27.7 Discrimination prohibited.
- 27.9 Assurance required.
- 27.11 Remedial action, voluntary action, and compliance planning.
- 27.13 Designation of responsible employee and adoption of grievance procedures.
- 27.15 Notice.
- 27.17 Effect of State or local law.
- 27.19 Compliance with Americans with Disabilities Act requirements and UMTA policy.

Subpart E—Mass Transportation Services for Individuals With Disabilities

Sec.

- 27.81 Program requirement.
- 27.83 Public participation and coordination.
- 27.85 Submission and review of program.
- 27.87 Provision of service.
- 27.89 Monitoring.
- 27.91 Requirements for small recipients.
- 27.93 Multi-recipient areas.
- 27.95 Full performance level.
- 27.97 Maintenance of effort.
- 27.99 [Reserved]
- 27.101 Technical exemptions.
- 27.103 Alternate procedures for recipients in States administering the section 5, 9, and 9A programs.

Appendix to Subpart E

3. By adding a new § 27.19 thereof, to read as follows:

§ 27.19 Compliance with Americans with Disabilities Act requirements and UMTA policy.

(a) Recipients subject to this Part shall comply with all applicable requirements of the Americans with Disabilities Act (ADA) of 1990 (Pub. L. 101-336) and the Department's regulations implementing the ADA (49 CFR part 37). Such compliance is a condition of receiving Federal financial assistance from the Department of Transportation. Any recipient not in compliance with this requirement shall be subject to enforcement action under subpart F of this part.

(b) Consistent with UMTA policy, any recipient of Federal financial assistance from the Urban Mass Transportation Administration whose solicitation was made before August 26, 1990, and is for one or more inaccessible vehicles, shall provide written notice to the Secretary (e.g., in the case of a solicitation made in the past under which the recipient can order additional new buses after the effective date of this section). The Secretary shall review each case individually, and determine whether the Department will continue to participate in the Federal grant, consistent with the provisions in the grant agreement between the Department and the recipient.

§ 27.85 [Amended]

4. By removing paragraph (a)(3) from § 27.85.

§ 27.95 [Amended]

5. By removing the words "subject to the limit on required expenditures provided for in § 27.97 of this subpart" from the second sentence of paragraph (a) of § 27.95, and ending that sentence with a period after the word "section."

6. By revising § 27.97 to read as follows:

§ 27.97 Maintenance of effort.

(a) Any recipient which, before the effective date of this section, has complied with this Subpart through a special service system or a mixed system, may change its mode of compliance to an accessible bus system. Such a change is subject to the public participation and plan approval requirements of §§ 27.83(e) and 27.85 of this subpart.

(b) Any recipient which changes its mode of compliance with this subpart as provided in this section shall maintain at least the level of special service it is providing on the date of issuance of this section, pending the effective date of final rules implementing the requirements of section 223 of the Americans with Disabilities Act (Pub. L. 101-336), with respect to paratransit as a complement to fixed route service.

§ 27.99 [Removed and Reserved]

7. By removing and reserving § 27.99 thereof.

Appendix to Subpart E—[Amended]

8. By removing from the Appendix to Subpart E the paragraph beginning "Subparagraph (a)(3) also requires * * *" under the heading "Section 27.85 Submission and review of program;" the paragraphs beginning "Section 27.97 provides that recipients * * *," "If a recipient cannot provide service that fully meets the criteria * * *," "This

criterion is subject to 'tradeoff' * * *" and "The service area criterion is subject to 'tradeoff' * * *" under the heading "Section 27.95 Full performance level.;" the portion of the appendix entitled "Section 27.97 Limit on required expenditures;" and the portion of the appendix entitled "Section 27.99 Eligible expenses."

[FR Doc. 90-23438 Filed 10-3-90; 8:45 am]

BILLING CODE 4910-62-M

49 CFR PART 37

[Docket Number 46861; Enactment]

RIN 2105-AB53

Transportation for Individuals With Disabilities

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Final rule; request for comments.

SUMMARY: The Department is taking regulatory action to implement those portions of the Americans with Disabilities Act of 1990 that require private and public transportation providers to acquire accessible vehicles beginning August 26, 1990. This rule also incorporates the Department's response to comments on the accessible motor vehicle provisions of a March 1990 notice of proposed rulemaking to amend the Department's rule implementing section 504 of the Rehabilitation Act of 1973.

DATES: This rule is effective October 4, 1990. Comments should be received by January 2, 1991. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to Docket Clerk, Docket No. 46861, Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Room 4107. For the convenience of persons who will be reviewing the docket, it is requested that commenters provide duplicate copies of their comments. Comments will be available for inspection at his address Monday through Friday from 9 a.m. through 5:30 p.m. Commenters who wish the receipt of their comments to be acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date-stamp the postcard and mail it to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and

Enforcement, Department of Transportation, 400 7th St., SW., Room 10424, Washington, DC 20590. Telephone 202-366-9306 (voice); 202-755-7687 (TDD). For UMTA-related questions, Susan Schruth, Office of Chief Counsel, Urban Mass Transportation Administration, 400 7th Street, SW., Washington DC 20590, Room 9316. 202-366-4011. Taped copies of the final rule are available on request.

SUPPLEMENTARY INFORMATION:

Background

Since 1977, the Department has issued a series of regulations to implement section 504 of the Rehabilitation Act of 1973, section 16 of the Urban Mass Transportation Act, and related statutes with respect to mass transit services for persons with disabilities. A 1977 Urban Mass Transportation Administration (UMTA) regulation required Federally-funded transit authorities to make "special efforts" to provide transportation services to such persons. In 1979, the Department replaced the 1977 rule with a regulation to require the purchase of accessible buses and the retrofit of rail mass transit systems for accessibility. In a suit brought by the transit industry, the courts found that the 1979 rule exceeded the Department's authority under section 504 by imposing undue financial burdens on transit authorities.

In 1981, in response to this court decision, the Department published an interim final rule that, in effect, revived the 1977 "special efforts" approach. Responding to concerns that service provided by transit authorities under this rule was inadequate, Congress added a new section 16(d) to the UMTA Act in 1983. While the new section required the Department to issue a rule containing minimum service criteria for service to disabled persons, it did not require equal access to transit for disabled persons or comparable service. It did require the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

The Department issued a rule to implement this statute in 1986. The rule contained six service criteria, which were used to measure adequate service to disabled passengers. In addition, to avoid the "undue burdens" problem that had resulted in the demise of the 1979 rule, the rule included a "cost cap". The cost cap provided that a transit authority did not have to spend more than three percent of its operating budget to comply with the rule, even if, as a result, the transit authority did not fully meet all the service criteria.

Last year, the U.S. Court of Appeals for the Third Circuit determined that, while it was appropriate for the Department to take costs into account in formulating the rule, the three percent cost cap mechanism was arbitrary. The court directed the Department to revise the rule consistent with its opinion. However, the entire rule, including the cost cap provision, has remained in effect pending the promulgation of a new final rule. Under a court-specified schedule, the Department agreed to issue a final rule by September 21, 1990.

Meanwhile, in connection with Congressional consideration of a bill to establish the American with Disabilities Act (ADA), the Department articulated its support of policies that would substantially improve access to mass transit services for disabled persons. These policies included requiring all new buses to be accessible, requiring supplemental paratransit service for persons who could not use the fixed route transit service that was comparable to the service for the general public, and providing a means to allow transit authorities to avoid undue financial burdens resulting from supplemental paratransit service. Given its obligation to the court, and the Department's commitment to implementing the policies embodied in the ADA, the Department published a notice of proposed rulemaking (NPRM) that proposed to replace the existing mass transit regulation with one that adopts these policies (55 FR 11120; March 26, 1990). This NPRM covered requirements for the acquisition of accessible vehicles, provision of supplemental paratransit service, alternative mechanisms for dealing with undue financial burdens of supplemental paratransit, and administrative provisions. (The NPRM did not include provisions relating to rail systems or vehicles.) The Department received 168 comments on the proposed rule, from transit providers, individuals with disabilities and groups representing them, state and local government agencies, and others.

On July 26, 1990, President Bush signed the ADA. Though the ADA, as enacted, differs in a number of details from the bills to which the Department had referred in preparing the March 1990 NPRM, the basic policy outlines of the Act are very similar to the Department's NPRM. All new vehicles must be accessible, there must be paratransit for persons who cannot use accessible mainline service, and relief may be provided where the paratransit requirement would result in undue financial burdens. There are also

requirements concerning transportation services provided by public entities who do not receive Federal funds and by private entities, as well as requirements for light, rapid, commuter and intercity rail systems. The March 1990 NPRM did not propose requirements in these areas.

The ADA requires that public and private entities begin acquiring accessible vehicles after August 25, 1990. In addition, the statute requires the Department to issue final implementing regulations for all aspects of the Act for which it is responsible by July 26, 1991.

In view of these developments, the Department has decided to proceed at this time with a final rule to implement the portions of the ADA concerning the acquisition of accessible vehicles. Since covered entities must begin acquiring such vehicles after August 25, 1990, it will be useful to them and to the public to have associated regulatory requirements in place by that time. This rule also responds to comments on those portions of the March 1990 NPRM concerning the acquisition and use of accessible vehicles, since these comments are directly relevant to the provisions of the ADA which this rule implements. Although the NPRM was issued under the authority of section 504 rather than that of the ADA (which had not been enacted at the time), the NPRM's provisions paralleled the policy decisions embodied in the ADA bills. The Department believes that the comments on the March 1990 NPRM provisions are an adequate basis for making decisions on the issues involved in implementing the parallel provisions of the ADA.

The Department is not issuing a final rule at this time with respect to the supplemental paratransit and undue financial burden issues on which comment was sought in the March 1990 NPRM. In the ADA, Congress determined that a time frame of one year from the date of enactment was appropriate for the resolution of these issues, as well as on other issues related to the operation of transportation systems and the accessibility of transportation facilities. The comments to the March 1990 NPRM, in addition, indicated that, in the view of many commenters, additional work was needed to refine the supplemental paratransit proposals and to develop a workable undue burden mechanism. The ADA requires a different approach with respect to some aspects of supplemental paratransit. For these reasons, the Department intends to develop a supplemental notice of proposed rulemaking (SNPRM) on these issues,

with the intent of publishing a final rule in the time frame called for by the ADA.

Nevertheless, the Department retains its obligation to the courts to modify its existing section 504 rule. In addition, it is necessary to provide guidance to UMTA grantees concerning their responsibilities during the period before the Department's final ADA regulations take effect. For these reasons, the Department is issuing a final rule amending 49 CFR part 27. This amendment will do two things. First, it will delete the three percent "cost cap," provision of the rule. Second, it will require that any UMTA grantee which changes the mode of accessible service delivery from special service to accessible bus must continue to provide special service at least at the level it now provides. This "maintenance of effort" requirement is intended to prevent a transit authority from eliminating or severely curtailing paratransit service, only to have to build it up again when the Department's rule implementing the ADA's supplemental paratransit requirement goes into effect. These amendments are discussed in greater detail in the preamble to the part 27 amendment.

In the March of 1990 NPRM, the Department noted its intention, "[b]efore publishing a final rule . . . to complete, and make available for public comment, a detailed analysis of the various options set out in this proposal." The Department commissioned a study by a consultant for this purpose. The results of that study with respect to the purchase of accessible buses are reported in this preamble. The results of the study with respect to supplemental paratransit need further refinement in light of the enactment of the ADA, which eliminated or altered some of the alternatives considered in the study. These results will be reported in conjunction with the NPRM dealing with supplemental paratransit and other ADA implementation matters.

In order to avoid confusion between the regulation implementing the ADA and the implementing regulation for section 504, the Department has decided to create a new 49 CFR part 37. We anticipate that, when part 37 is completed in 1991 with the addition of provisions concerning supplemental paratransit, undue burdens, rail service and other ADA requirements, the Department's existing section 504 rule—49 CFR part 27—will be revised to require compliance by DOT grantees with part 37's requirements.

Section-by-Section Analysis

Subpart A—General

This subpart deals with general administrative matters. When the final ADA rule is issued in 1991, this subpart will probably include additional sections on such subjects as the submission of plans and public participation.

Section 37.1 Purpose

This section states simply that the rule is intended to implement the transportation and related provisions of the ADA.

37.3 Applicability

The key point of this section is that, unlike part 27 (which is based on section 504), this rule applies to covered entities whether or not they receive Federal financial assistance. The rule applies to both public and private entities that provide transportation service, whether or not they are primarily engaged in providing such services.

Paragraph (b) clarifies the status of private entities that contract with UMT Act recipients or other public entities to provide service. This paragraph emphasizes that, in contracting for service from private entities, public entities and their contractors cannot circumvent the intent of the ADA.

In the transit area, service is provided in a variety of ways. It is not only UMTA recipients and other public entities who own and operate their own vehicles. In many cases, public entities contract for services with private entities to provide transportation services. Since this is technically neither a purchase nor a lease, the Department is concerned that entities not be confused about the necessity for compliance with ADA accessible vehicle requirements in such cases.

The definition of "operates" in the ADA makes it clear that a private entity which contracts with a public entity stands in the shoes of the public entity for purposes of determining the application of ADA requirements. This definition includes "operation of such system by a person under a contractual or other arrangement or relationship with a public entity." For example, in the absence of paragraph (b), it is possible that a public entity, instead of purchasing or leasing an accessible vehicle, could contract with a private entity, which would provide service with inaccessible vehicles. To do so would clearly conflict with the principles of the ADA. Paragraph (b) spells out that the ADA's public entity requirements for vehicle acquisition apply, as well, to private entities having

a contract with a public entity to provide public transportation services.

The Department seeks additional comment on this issue, since it is possible there could be situations in which a transit operator still could avoid, through contracting out, providing accessible vehicles at the same rate it would if it were purchasing its own vehicles for the service. One option the Department is considering is to modify the definition of purchase or lease in the regulation to include contracts for services. Another option would be for the Department to establish a provision requiring that a private entity contracting to provide service for a public entity maintain at least the same ratio of accessible vehicles currently in the public entity's fleet (this ratio would naturally rise as the public entity acquired more accessible vehicles).

Section 37.5 Definitions

With a few exceptions, the definitions in this section are taken directly from those in the ADA. In some cases, the ADA's definitions are elaborated. For example, the definition of "commuter authority" spells out the content of the statutory reference the ADA makes to the Rail Passenger Service Act. It should be noted that the list of entities in this definition is not exhaustive. Some entities not listed (e.g., the commuter rail operator in the Chicago area) would also be covered.

Many details in the definition of "disability" are drawn from existing regulations, such as part 27 and the Air Carrier Access Act rule (14 CFR part 382). Intercity and commuter rail cars are given simple definitions not found in, but compatible with, related definitions (e.g., of intercity and commuter rail transportation) in the Act. The term "fixed route" includes rail as well as bus vehicles or vans (UMTA program usage in the past for this term did not include rail vehicles). In addition, this definition does not include service which involves an interaction between the user and the system, beyond waiting at a stop for a bus. If, in order to receive service, a potential user must, or may, call in advance to request service, the system would be considered demand responsive rather than fixed route, even though there may be fixed starting and ending points.

For example, some systems, especially in rural areas, may operate what are sometimes called "fixed route deviation" segments, in which a vehicle begins a run at point A and ends at point B. The stops it makes in between A and B are determined by advance phone requests from users, and may cover substantial area off the most

direct route between A and B. This sort of system would not be regarded as fixed route for purposes of this Part.

The definition of "solicitation" has been provided by the Department in order to clarify what actions after August 25, 1990, must result in the purchase or lease of accessible vehicles. The definition refers to the closing date for the submission of bids or offers in a procurement. Under § 37.21(a), for example, this definition requires that any new vehicles which a public entity operating a fixed route system purchases or leases for use on that system be accessible as long as the closing date for vendors to submit bids or offers to the entity for the vehicles is after August 25, 1990.

The Department has fully supported the adoption of the ADA, and DOT officials have urged transit operators to ensure that new bus orders then being developed were only for accessible buses. The Department recognizes that the definition of solicitation affects some procurements in progress. We are aware of this, but have defined the term as broadly as possible, consistent with the intent of the legislation.

The Department points out that, under an amendment to 49 CFR part 27 being issued today, any UMTA recipient procuring inaccessible vehicles in procurements not covered under this Part (e.g., under an option on a previously-awarded contract), the recipient must provide actual notice to the UMTA Administrator. MTA reserves it right under the grant agreement to terminate the grant if it determines that the purposes of the UMT Act would not be served adequately by continuing the project. UMTA will review these procurements on a case-by-case basis and determine the appropriateness of further Federal participation.

If an entity procures used or remanufactured vehicles, the applicability of ADA requirements is not keyed to solicitation dates. Rather, the ADA requires, with certain exceptions, that used or remanufactured vehicles purchases or leased after August 25, 1990, to be accessible.

Therefore, under §§ 37.23(a), 37.25(a)(2), 37.31(a)(2), 37.53(a), 37.55(a)(2), 37.83(a), and 37.85(a)(2), the Department interprets the date of the purchase or lease as the date when the entity is obligated to make the purchase or lease. This date is generally the date the entity signs the contract or is otherwise legally bound under the agreement.

The definition of Secretary includes designees: We anticipate that the UMTA Administrator will be delegated various

functions under this regulation. The text of the rule identifies the UMTA Administrator (who may also designate other UMTA officials to perform various functions), where functions assigned to the Secretary by the ADA have been delegated to the Administrator. Of course, any function which has been delegated in this way may be performed by the Secretary rather than the UMTA Administrator or other officials. For example, if a statutory function is assigned to the Secretary, and the regulation assigns that function to the Administrator, the Secretary may nonetheless perform the function on a case-by-case or regular basis, at his or her discretion.

Section 37.7 Nondiscrimination; Provision of Service

Paragraphs (a) and (b) establish general nondiscrimination provision with respect to the use of transportation services provided for the general public. They are very similar to § 27.87(c) of the Department's existing section 504 rule. The proposed retention of this provision was not the subject of comment to the March 1990 NPRM.

Paragraphs (c), (d), (e), and (f) are based on paragraphs (b)(1), (b)(3), (b)(4), and (b)(5) of § 27.87 of the Department's existing section 504 rule. The proposed retention of these provisions generated little comment. Several comments, from both transit providers and disability groups, supported the section as written.

With respect to training, one disability group suggested a more extensive training program, similar to that required under the Air Carrier Access Act regulations (14 CFR part 382) the Department issued in March 1990. A transit authority asked for dedicated Federal funds for training. The same transit authority asked for additional Federal funding to maintain spare accessible vehicles, as did one other commenter. A commenter suggested, on the subject of timeliness, that if paratransit pickup time was not within 30 minutes of schedule, that the trip should be for free, with an additional free trip for each additional 15 minutes of tardiness.

Two commenters asked for accommodations at multi-route stops for persons with vision impairments. That is, a blind person at a stop served by buses from five routes needs time to determine, and a method of determining, whether a particular bus is the right one. One of these commenters also suggested requiring the announcing of stops and the use of large-print signs. With respect to communications capacity, one commenter said that there should be such capacity for disabled persons equal

to that for other persons, not just "adequate" capacity.

The Department responds to these comments as follows. In its subsequent ADA NPRM, the Department will seek comment on training requirements. The Department cannot make additional funding available for any purpose through a rulemaking proceeding. The notion of a free trip if a vehicle is 30 minutes late probably is not feasible in public transportation for people with disabilities, where traffic problems and other circumstances beyond the control of the provider can result in delays.

There are some simple, low-cost means of assisting vision impaired or other passengers who may have difficulty identifying a bus at a multi-route stop. For example, some transit authorities issue numbered or color-coded cards to passengers, who hold them up when a bus approaches. The driver tells the passenger that the correct bus has arrived when the driver sees a card pertaining to his or her route. Also, the Department regards announcing bus stops as an easy, low-cost means of assisting passengers who have difficulty in knowing where to leave the bus. There is substantial merit in routinely announcing all stops (buses in some systems have automatic recording systems that do so).

Large print signs are a good idea, and can help all passengers waiting for a bus. However, not all buses or types of bus signage are designed to accommodate them. The Department encourages transit providers to take steps of this kind, and we seek further comment on whether these or similar steps should be required as part of the final ADA rule to be published in 1991.

As long as people with disabilities can get through to an information operator or a trip scheduler as quickly as a person who is not disabled (which is what we mean by "adequate" communications capability), the intent of the statute is met. It is not necessary to have as many TDDs as voice phones, for example, so long as a hearing impaired consumer can get through on a TDD in the same amount of time as another consumer can be served on the voice phones.

An issue closely related to provision of service requirements generated more comment than any other raised in the March 1990 NPRM: How should transit providers deal with so-called non-standard or non-traditional wheelchairs or mobility devices? This category includes such things as three-wheel scooters, unusually heavy electric wheelchairs, and devices with cambered or small wheels. The NPRM proposed that the lift and securement facilities on

an accessible vehicle be capable of accommodating all types of wheelchairs in common use.

Though many comments did not mention the fact, this proposal echoed a requirement of the existing 49 CFR part 27, Section 27.87 of the existing rule, "Provision of Service," provides that each recipient shall, at all times, provide service to all eligible handicapped persons, including "ensuring that vehicles and equipment are capable of accommodating all the users for which the service is designed." (This provision, as discussed above, is incorporated in this regulation.) The appendix to subpart B of the part 27, which sets forth the Department's controlling interpretation of the regulatory provisions, explained this provision as follows:

"... a recipient which chose to comply with the rule by making its bus fleet accessible would have to ensure that the lifts, securement devices, etc. on the buses could accommodate all types of wheelchairs in common use. A lift which accommodates manual wheelchairs, but fails to accommodate common models of electric wheelchairs (including, for example, the increasingly popular three-wheel designs) does not make the buses accessible. Providing only such limited-use lifts is inconsistent with this section. (Of course, if a special service component of a mixed system transported persons whose wheelchairs could not use the lifts to all destinations in the service area, and otherwise met the service criteria, the limitation on the use of the lifts would be permissible.)

This requirement has been among the requirements affecting UMTA-funded transit authorities since 1988.

In addition to the comments sent to the docket on this issue, the Department obtained information from a June 1990 conference, sponsored by the Transportation Research Institute at Oregon State University, on the subject of transportation on non-standard mobility devices. DOT staff members participated in the conference, and the preliminary report of the conference has been placed in the docket for this rulemaking.

Many commenters made the point that there are lots of different kinds of mobility devices, and that the types of devices, including very specialized devices, continue to proliferate. At the conference, a presenter provided an extensive, illustrated, typology of mobility devices, many of which are far different from the standard manual or electric wheelchair with which many transit operators are familiar.

Many commenters, principally transit providers, provided a lengthy list of problems they perceived with three-

wheel scooters. Many scooters are not readily able to be secured by some types of securement systems, and lack of attachment points to the frame to facilitate being tied down. Some models are too light-duty to stand up to stresses of the kind involved in transit accidents. Some scooters are too long for some lifts. Breakage of the seat stem and instability resulting from a high center of gravity and narrow wheelbase were mentioned by numerous commenters (presenters at the conference described the engineering basis for stability problems).

A lack of armrests to stabilize sideward motion of the occupant was another problem with some models, and other commenters mentioned a concern about injury from the non-folding steering column on some models. Some manufacturers of scooters, apparently in order to limit their liability, do not recommend or warrant their products for use on transit vehicles.

Scooters are not the only problematic type of mobility device of concern to transit providers. Device/passenger loads in the 600-700 pound weight range are too great for some lifts, and the dimensions of some devices exceed lift dimensions. Devices other than scooters lack attachment points. Some securement systems do not work well with lightweight chairs, or sports chairs with cambered wheels, power wheelchairs with four small wheels in the base, or some designs with pneumatic tires. Gurneys don't fit, and there are also problems with small stroller-type chairs used for children with disabilities.

Having to deal with the problems of all the different sorts of mobility devices created substantial concern about liability, many transit providers said. For the most part, these comments reflected fear of what could happen in the future; only two comments mentioned knowledge of actual accidents or lawsuits related to wheelchair issues. (Several commenters mentioned a lack of accident data related to the transportation of wheelchairs and wheelchair users.) On the other hand, a major transit authority that has carried three-wheel scooters for several years mentioned that it had experienced no accident or lawsuit problems, and said it was not greatly concerned about liability.

How do transit authorities now deal with the problems they see with carrying various sorts of non-standard mobility devices? First, a number of transit providers relate having found or devised securement systems that do a good job of restraining a variety of mobility devices, including scooters.

These were usually four-point belt systems or combined wheel clamp and belt systems.

Second, a number of transit authorities either refuse to carry scooters and other non-standard devices or carry the devices but require the passenger to transfer out of his or her own device to a vehicle seat. This latter requirement typically is imposed when the transit provider believes it can successfully secure the mobility device but not the passenger while sitting in the device.

Based both on the comments and on a survey conducted by a presenter at the conference, it appears that a majority of transit providers (both fixed route and demand responsive) take one or another of these approaches. They do so on grounds of safety (i.e., preventing injuries to wheelchair passengers and also, to some extent, other passengers). On the other hand, a smaller number of transit providers (including some with the longest and most successful history of providing accessible bus service) said they transported scooters and other devices regularly, did not require transfer in many cases, and had not experienced the problems about which other transit agencies expressed concern.

A number of disability group commenters and individuals with disabilities argued that transit authorities should not be able to impose restrictions of this kind. (A few transit providers made similar comments as well). Such commenters supported the NPRM proposal on this point.

While not necessarily disagreeing with the idea that some devices could create problems in transit, these commenters argued that actual experience did not bear out the fears expressed by transit providers who imposed restrictions. Some commenters related personal experiences of safely riding in transit vehicles safely in "panic stop" situations while not restrained. Some commenters mentioned that there were a number of risks to passengers from transferring out of their personal devices (e.g., injury during transfer, lack of appropriate restraints in the vehicle seat, greater likelihood of injury in a vehicle seat than in a device designed for their needs). This may be particularly true for individuals who, because of the effects of their disability, have less strength or muscular control than other persons.

Other commenters, and participants in the conference, suggested that it was unreasonable, and discriminatory, to focus on risks posed by disabled passengers. For example, if a wheelchair user sitting in his wheelchair is not

personally restrained, the person may be thrown about the vehicle during a rapid deceleration. A standing able-bodied passenger, who is permitted to be in the aisle without restraint, will likewise become mobile. So will large packages, infants in the arms of parents, strollers, shopping carts and other items which transit authorities do not restrict. It would be inconsistent with section 504 and the ADA, in these commenters' views, to allow transit authorities to impose restrictions on disabled passengers to reduce risks analogous to those for which no restrictions are imposed on other passengers.

Commenters had a number of suggestions on how to deal with this set of issues over the long term. Wheelchair manufacturers should be encouraged or required to work with other interested parties to create a transport-compatible wheelchair. DOT, the Department of Veterans' Affairs, the Department of Health and Human Services, the ATBCB, and other agencies should work with manufacturers, transit agencies, and consumers to develop standards for transportable wheelchairs. (For example, mobility devices could include rings or other attachment points for tie-down straps, some commenters suggested.) Ultimately, in some commenters' views, only devices meeting such standards should be required to be carried on transit vehicles. Standards for vehicles, lifts, and securement devices are needed as well, many commenters said. Additional research concerning both transportable mobility devices and vehicles and vehicle equipment is needed, commenters added.

B.C. Transit (the transit agency for Vancouver, British Columbia) videotaped eight crash test trials in which a paratransit van was run into a barrier at 20 m.p.h., carrying a scooter ridden by an anthropomorphic dummy. Briefly summarizing the results of these tests (B.C. Transit's paper on the tests is incorporated in the docket), securement systems generally prevented the scooters from leaving the securement area. However, there was substantial deformation of the scooters and considerable vertical movement of the scooters within the tie-down straps (i.e., a 10-12" rebound off the vehicle floor). Securement of the dummies was not as successful; the dummies experienced upward and rearward motion that could cause death or serious injury to human occupants.

These tests took place in relatively small, stiff (from a structural point of view) paratransit vans. Substantial deceleration forces (approximately 30-

45g) were generated. It is forces of this magnitude that resulted in the observed effects. As vehicles become larger and/or more flexible, the forces from a collision at the same speed decrease. For example, in the B.C. transit crash test, one trial involved the van crashing into a parked full-size transit bus rather than into a concrete barrier. The bus absorbed the force of the collision with greater flexibility than the concrete barriers used in the other trials, resulting in lower forces in the van. More interestingly, although there was not a scooter or dummy in the bus to test the effects on them of the forces affecting the bus, forces experienced in the bus appeared to be markedly less than those experienced in the van.

A comment from the engineering professor who organized the conference underlined the distinction between the forces at work in paratransit vehicles, full-size buses, and rail cars (where securements are typically viewed as unnecessary). Generally, the smaller and lighter the vehicle, the greater the need for restraint.

Finally, a number of comments asked for clarification of the term "in common use." Some suggested clarifications, such as wheelchairs that accounted for 98 percent of use by disabled transit riders or devices that were defined as transit compatible by transit agencies. Other comments suggested phasing in the "carry all devices in common use" requirement over five years to allow lift and securement technology to catch up with the variety of devices in use by passengers.

The Department agrees with the commenters that this is a difficult set of issues, both technically and as a matter of policy. We support the call for the development of standards for vehicles, lifts, and securement devices, as well as for the transit-compatible wheelchair. A number of efforts are now underway to develop standards in this area. Such organizations as the Canadian Standards Association, International Standards Organization, Society of Automotive Engineers, and National Highway Traffic Safety Administration are at work on standards affecting one or more aspects of this problem. The standards that the ATBCB must develop under the ADA will also have to address some of these issues. Efforts are also under way or complete in Australia and a number of European countries to develop standards. The Department is actively cooperating with other bodies in the development of standards.

The ADA requires the ATBCB standards for accessible vehicles to be complete by April 1991. These standards should resolve some of the issues (e.g.,

by establishing requirements for the dimensions and weight bearing capacity of lifts). Other standards may not be complete for some years, however. The Department has the responsibility of addressing these issues under section 504 and the ADA, since they pertain to the actual ability of users of mobility devices to receive transportation in a nondiscriminatory way.

The comments have suggested a number of points on which the Department would like to receive additional information and comment:

1. Many comments expressed concern about possible accident and litigation risks. What evidence is there that this potential problem is real? That is, what actual accidents or injuries have happened that can be attributed to the use of non-traditional mobility devices in transit vehicles? How do the facts of these specific accidents bear on the issues discussed above? What accident statistics or studies have been done that address these issues? Do these studies, or other evidence, demonstrate actual, as opposed to speculative, risks from allowing users of non-traditional mobility devices and the devices themselves on transit vehicles?

2. Comments asserted that it was discriminatory for transit providers to insist on securement for mobility device users that was not required for other persons using transit (e.g., standees, people with large packages, people with grocery carts or infants in strollers). By what rationale do transit providers justify restrictions on one set of persons but not another? In human factors terms, are there differences in the characteristics of various passengers or what would happen to them in an accident or panic stop situation that would justify such different requirements under a nondiscrimination statute like the ADA or section 504?

3. Commenters expressed concern that requirements that a passenger transfer to a vehicle seat could pose problems for the passenger (e.g., unsuitability of a vehicle seat for a particular disabled passenger, inadequate securement in the vehicle seat, risks of injury from the transfer or from sitting in the vehicle seat). How do transit providers address such problems? Should transfer requirements be keyed to the individual passenger (e.g., based on assessment of the relative risks to the particular passenger of transfer vs. remaining in the mobility device)? Should transfer be required even if the vehicle seat does not have securement capability for the passenger?

4. Given differences in vehicle characteristics (e.g., in probable deceleration forces in larger vs. smaller

vehicles), should requirements pertaining to non-traditional mobility devices differ among vehicle types? For example, should a transit provider be able to require a transfer in a small paratransit van but not in a full size transit bus?

5. Once ATCB standards for lifts are established, should transit providers be required to transport any device which is compatible with the dimensional and weight limits of lifts meeting the Standards? Are there other definitions of mobility devices that should be required to be transported, or that should not be required to be transported? If so, should the criterion be a general one (e.g., "in common use") or should it attempt to be more specific (e.g., a list of types or models of devices). Would it be practicable for either the Department or a third party to develop and update such a list?

6. Should transit providers be required to use securement systems of the sort that have proven effective in use by other transit providers? Should such requirements apply to new vehicles only, or should a retrofit requirement be imposed on existing accessible vehicles with less adequate securement systems?

7. Should transit vehicle operators be required to assist passengers with securement of themselves and their mobility devices, whether the devices are "standard" or non-traditional in character? If not, how can the transit provider meet its obligation to provide service to users of these devices, many of whom may be unable, by reason of their disabilities, to operate the securement systems?

The Department intends to respond to the comments on this issue, and further information we receive in response to these questions, with a provision in the July 1991 final ADA rule. By this time, of course, we will be able to take into account the ATCB standards that are relevant to these issues. Meanwhile, the provision of service section of the regulation will continue to govern the transportation of non-traditional mobility devices.

Under this provision, each covered entity must ensure that vehicles and equipment are capable of accommodating all users for which the service is designed. As noted in the portion of the 1988 appendix quoted above, this means that lifts and securement devices must accommodate all types of mobility devices in common use (specifically including electric wheelchairs and three-wheel scooters). "In common use" is meant to be a broadly inclusive term, excluding only devices that are very unusual or very

unusually configured (e.g., gurneys, highly customized devices with unusual dimensions). If a transit provider cannot or is unwilling to provide transportation to a particular type of "common use" device on the vehicles it normally uses to provide service to persons with disabilities (e.g., because of safety concerns or because the mobility device cannot be maneuvered to a securement location), then the provider has the responsibility of arranging alternative transportation.

Subpart B—Bus, Van and Other Non—Rail Transportation Systems

The provisions in this subpart concern the acquisition of buses, vans, and other non-rail vehicles for fixed route and demand responsive systems. Requirements concerning the operation of these systems are also included. These provisions are based on the ADA and on the March 1990 NPRM.

Section 37.21 Purchase or lease of new vehicles by public entities operating fixed route systems

The NPRM provided that all new purchased or leased vehicles would have to be accessible. Under certain conditions, there could be a temporary waiver of the requirement to purchase lift-equipped buses (i.e., where lifts were not available in a timely fashion). This provision would apply only to public entities.

All the disability groups that commented, and a large number of transit providers at well, supported the proposed requirement to acquire new accessible equipment. One disability group asked that the requirement also apply to buses already in a manufacturer's inventory when a purchase agreement is made after the effective date of the requirement, and that all buses delivered a certain time (e.g., 60 days) after the requirement goes into effect be required to have lifts, regardless of when the bus was ordered or manufactured.

A few transit agencies specifically asked that no retrofit of vehicles already in their fleets be required, and three suggested that less than 100 percent fleet accessibility be required. A substantial number of transit agencies noted that they already have, or plan to have, significant numbers of accessible buses in their fleets. On the other hand, a substantial number of transit agencies argued against the accessible bus requirement, saying the paratransit provided better service, that local option should be maintained as a policy matter, that accessible buses are too expensive, or that use of lifts will delay bus schedules.

With respect to the lift waiver provision, most transit agencies that commented favored the idea of a waiver. Several suggested additional concerns. One suggested the waiver should cover lengthy delays as well as unavailability. Others suggested additional grounds for waivers, such as the unavailability of maintenance facilities or the need to use narrower buses that have difficulty accepting lifts on certain routes. Another expressed concern about the timeliness of DOT responses to waiver requests.

Among disability group commenters, several expressed opposition to the idea of a waiver, some saying that the market will catch up with the demand for lifts or that even substantial delays in procurements to acquire lifts would not harm transit agencies significantly. Other suggested limitations on waivers, such as restricting their availability to "impossibility" situations, limiting the length of the delay which would be grounds for a waiver (e.g., to over 60 days), limiting the duration of a waiver (e.g., to one year), or linking the unavailability of lift equipment which is the basis for the waiver to the date of delivery of the buses, not the date of solicitation.

One commenter also said that information about waivers should be available in accessible formats. Another suggested that transit agencies should be required to dedicate funds saved through a waiver to other accessible transit purposes. A city mayor's office suggested that there be a public hearing and comments to DOT before DOT decides whether to grant a waiver. This commenter also suggested that when a waiver is granted, the transit agency be required to acquire vehicles capable of accepting a lift (which could begin service without the lift), but that a lift be installed as soon as it becomes available.

The ADA definitely resolves many of the issues raised by the commenters (see ADA sections 222(a) and 225). Public entities will have to purchase and lease new accessible vehicles, with respect to any vehicle for which a solicitation is made after August 25, 1990. The ADA also includes a lift waiver provision, which spells out four conditions under which DOT may temporarily relieve a transit provider from the obligation to purchase accessible vehicles. The final rule collapses these four conditions into three. The third statutory condition—that the public entity has made good faith efforts to locate a qualified manufacturer to supply the lifts—appears to assume a direct relationship between the transit provider and the lift

manufacturer. In fact, it is the bus manufacturer, rather than the transit provider directly, which would have the task of looking for a supplier of lifts to meet the transit provider's specifications. The task must still be performed, and the Department will not grant a waiver in the absence of documentation that good faith efforts have been made to obtain the lifts in a timely fashion (see paragraph (e)), but the language of this section has been altered to fit better the relationship among the parties involved.

The legislative history of the ADA specifically deals with the subject matter of one of the comments. The Report of the House Committee on Public Works and Transportation made the following statement on this subject:

The committee understands that certain fixed route operators may be restricted from using accessible, 102" wide commuter buses for various reasons. One alternative vehicle which would meet the requirements of the Act is the 96" (wide) commuter bus, which some manufacturers are apparently unwilling to fully warrant due to structural modifications necessary to accommodate a wheelchair lift. Another alternative is the 96" (wide) suburban bus, which does not have the structural difficulties in accommodating a lift that a commuter bus does. A fixed route operator would not qualify for a waiver under this section from wheelchair lift purchase requirements for a 96" commuter bus since an acceptable alternative—the 96" wide, lift-equipped suburban bus—exists. (H. Rept. 101-485, Pt. 1, at 32-33).

Consequently, the Department will not make provision in the rule for this situation. The Department will also be guided by the Committee Report in considering any waiver request that is made on this basis.

The Department needs certain information to determine whether a transit provider meets the four statutory criteria for a waiver, "to the satisfaction of the Secretary." Consequently, a waiver request must include a copy of the written solicitation (showing that it requested lift-equipped vehicles) and written responses from lift manufacturers to the vehicle manufacturer documenting their inability to provide the lifts. Since typically bus manufacturers, rather than transit agencies, contact subcomponent manufacturers, the transit agency will include with its waiver request copies of the lift manufacturers' responses to inquiries from the bus manufacturer. The information from lift manufacturers must also indicate when the lifts would be available.

In addition, the waiver request must include copies of advertisements in trade publications and inquiries to trade

associations, seeking lifts for the buses. The public entity must also include a full justification for the assertion that a delay in the bus procurement sufficient to obtain a lift-equipped bus would significantly impair transportation services in the community. The Department is not adopting any *per se* standard of how lengthy a delay in a procurement would trigger this "significant impairment" test. It will be more difficult to obtain a waiver if a relatively short rather than relatively lengthy delay is involved. A showing of disruption to planned procurement timetables, absent a showing of significant impairment of actual transit services, would not form a basis for granting a waiver.

Any waiver granted by the Department under this provision will be a conditional waiver. The conditions are intended to ensure that the waiver provision does not create a loophole in the accessible vehicle acquisition requirement that Congress intended to impose. The ADA requires a waiver to be limited in duration, and the rule will require a termination date to be included. This date will be established on the basis of the information the Department receives concerning the availability of lifts, in the waiver request and elsewhere. In addition, so that a waiver does not become open-ended, it will apply only to a particular procurement. If a transit agency wants a waiver for a subsequent procurement, it will have to make a separate waiver request.

This includes a situation in which the delivery of buses ordered as the result of a particular solicitation is phased over a period of time. For example, suppose a transit provider orders 20 buses on October 1, 1990, and wants to take delivery of the first five buses this year, with the remaining buses to be delivered in a year. If there are no lifts available this year, the transit provider could obtain a waiver (assuming all criteria are met) for the first five vehicles. The waiver would not apply to the rest of the buses, however, and a separate waiver application would have to be made for them, if the transit provider wished to obtain them without lifts.

The purpose of the waiver provision in the ADA, as the Department construes it, is to address a situation in which, because of a potentially sudden increase in demand for lifts, lift manufacturers are unable to produce enough units to meet the demand in a timely fashion. This is, as the title of the ADA provision involved suggests, a temporary situation calling for "temporary relief." A waiver should

allow a transit provider meeting the statutory standards to bring vehicles into service without lifts. But there is no reason related to the purpose of this provision of the ADA why the vehicle should remain inaccessible throughout its life. We believe that there is merit to the comment that a vehicle purchased under a waiver should be capable of accepting a lift, and that a lift should be installed as soon as it becomes available. The final rule so requires.

Section 37.23 Purchase or lease of used vehicles by public entities operating a fixed route system

The NPRM proposed that, as with new vehicles, acquisitions of used vehicles would have to be for accessible vehicles. The proposal included an exception, for situations in which a transit provider made good faith efforts to obtain accessible used vehicles but did not succeed in finding them.

There were a few comments both for and against the idea of requiring the acquisition of used accessible vehicles. Several comments suggested that the good faith efforts exception was a bad idea, and that all used vehicles should be accessible. Most of the comment, however, centered on what procedures or standards should be used for determining whether the good faith efforts test has been met. Some of these comments simply asked for clarification of what the Department meant by "good faith efforts." Others suggested that the transit provider should decide, or the UMTA Regional Administrator. A few transit providers said that asking for accessible vehicles in bid solicitations should be enough. Another suggestion was to add a requirement for an active effort to solicit bids from owners of accessible vehicles. Two disability organizations emphasized that the search for accessible vehicles should be national in scope, and suggested that a transit provider wanting to avail itself of the good faith efforts exception should have to submit a waiver request to DOT with detailed documentation of its efforts. One of these comments also said that transit providers should not be able to take advantage of the exception because accessible buses were more expensive.

The ADA requires transit agencies to purchase accessible used vehicles, providing a "demonstrated good faith efforts" exception to the requirement (see ADA section 222(b)). The reports of the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor offered the following guidance on what "good faith efforts" involve:

The phrase "demonstrated good faith efforts" is intended to require a nationwide search and not a search limited to a particular region. For instance, it would not be enough for a transit operator to contact only the manufacturer where the transit authority usually does business to see if there are accessible used buses. It involves the transit authority advertising in a trade magazine, i.e., *Passenger Transport*, or contacting the transit trade association, American Public Transit Association (APTA), to determine whether accessible used vehicles are available. It is the Committee's expectation that as the number of buses with lifts increases, the burden on the transit authority to demonstrate its inability to purchase accessible vehicles despite good faith efforts will become more and more difficult to satisfy. S.Rept. 103-116 at 49; H.Rept. 101-485 at 90.

Consistent with this guidance and in response to the comments, the Department is requiring that good faith efforts include specifying accessible vehicles in bid solicitations. Second, good faith efforts include a nationwide search for accessible vehicles, involving specific inquiries to other transit providers. As the report language indicates, local or regional searches for accessible used vehicles are not sufficient. Unlike the report language, the regulation will not reference contacts with manufacturers, since, typically, transit agencies obtain used vehicles from other transit agencies or used vehicle dealers, not from manufacturers. Third, good faith efforts include advertising in trade publications and contacting trade associations.

The Department considered whether a transit agency seeking to use the good faith efforts exception should have to apply to the Department for a waiver, as some comments suggested. We have decided against so requiring. First, the ADA does not mandate such a requirement, unlike the purchase of new vehicles without lifts. Second, the Department believes that requiring a DOT waiver would unnecessarily slow the procurement process. Instead, the Department will require transit agencies to retain for two years records of their good faith efforts, which must be made available to DOT and members of the public on request. This will allow the Department and interested persons to monitor the procurement activities of transit agencies. Such information could also form a basis for enforcement action.

Section 37.25 Remanufacture of vehicles and purchase or lease of remanufactured vehicles by public entities operating a fixed route system

The NPRM proposed that a vehicle remanufactured to extend its useful life

for five years or more would have to be accessible, to the maximum extent feasible. A few transit agencies opposed this requirement; a few disability groups and transit agencies supported it. One comment asked for clarification of what the term "remanufactured" meant.

Most of the comments focused on the "to the maximum extent feasible" proviso of the proposal. One commenter opposed this proviso altogether, saying that all remanufactured buses should be accessible. Several commenters said that a structural integrity standard should be used. That is, remanufacturing a bus to be accessible should be viewed as feasible as long as accessibility modifications did not unduly weaken the frame or structure of the vehicle. Some comments suggested that this determination should be made after an engineering analysis. One disability group commented that inasmuch as all full-size transit buses meeting Advanced Design Bus standards (most buses manufactured since 1979) can accommodate lifts, a structural integrity standard would require most buses to be accessible. Two transit agencies commented that in addition to considering structural integrity, the feasibility standard should consider cost. For example, if the cost of the accessibility modification would eliminate the cost advantage of remanufacturing a bus over buying a new, accessible bus, then the accessibility modifications of the remanufactured bus should not be viewed as feasible.

The ADA (section 222(c)) requires public entities that remanufacture vehicles so as to extend their useful life for five years or more, or purchase or lease such remanufactured vehicles, to acquire accessible vehicles to the maximum extent feasible. This statutory requirement is reflected in the final rule.

In response to the comment that sought clarification about the definition of a "remanufactured" vehicle, the Department is adding a definition of the term in § 37.5. Three of the Congressional committee reports considered this issue (House Committee on Public Works and Transportation, H.Rept. 101-485, Pt. 1, at 28; House Committee on Education and Labor, H.Rept. 101-485, Pt. 2, at 90; Senate Committee on Labor and Human Resources, S.Rept. 101-116 at 50). In each report, the committee noted its understanding that a remanufactured vehicle was one that had been "stripped to its frame and is then rebuilt", as opposed, for example, to an engine overhaul. The Department's definition incorporates this concept, with the

wording modified to more closely describe the actual process involved (i.e., a vehicle which has been structurally restored and has had new or rebuilt major components installed to extend its service life).

With respect to the concept of "to the maximum extent feasible," the House Committee on Education and Labor and Senate Committee on Labor and Human Resources reports say that the language was inserted to clarify that the statute is not intended "to require accessibility for remanufactured vehicles if it would destroy the structural integrity of the vehicle." The House Committee on Transportation and Public Works report uses similar language: "remanufactured vehicles need only be modified to make them accessible to the extent that the modifications do not affect the structural integrity of the vehicle in a significant way."

Based on these statements and on the comments to the NPRM, the final rule provides that it is considered feasible to remanufacture a vehicle to be accessible, unless an engineering analysis indicates that specified accessibility features would have a significant adverse effect on the structural integrity of the vehicle. That it may not be economically advantageous to remanufacture a bus with accessibility modifications does not mean it is unfeasible to do so, in the engineering sense which Congress intended. Accordingly, the rule does not include economic factors among those which may be considered in determining feasibility.

The ADA adds a provision concerning remanufactured vehicles which was not part of the March 1990 NPRM. This is an exception for historic vehicles. The exception applies to a vehicle if: (1) It is of historic character, (2) it operates solely on a segment of a fixed route system which is on the National Register of Historic Places, and (3) making the vehicle accessible would significantly alter its historic character. When remanufacturing such a vehicle, the entity must incorporate only those accessibility modifications which do not significantly alter its historic character. (Historic vehicles are also subject to the "maximum extent feasible" proviso applicable to all remanufactured vehicles.) The final rule incorporates these provisions of the statute.

The Department seeks comment on whether the historic vehicle exception, as written, adequately addresses the range of situations affecting historic vehicles. For example, are there systems on which arguably historic vehicles are operated partly, but not solely, on a

system segment which is on the National Register of Historic Places? Does the Department have the discretion to, and should it, change the "solely" to "substantially" or a similar term which would, to some extent, broaden this provision's coverage?

During the development of final ADA rules, the Department will work on regulations to define a vehicle of historic character. The Department seeks comment on what this definition should include. The Department also seeks information on what fixed route system segments are listed on the National Register of Historic Places. Meanwhile, the Department will consider requests to designate vehicles as historic vehicles meeting the requirements of the ADA on a case-by-case basis. In doing so, the Department will consult with the National Register of Historic Places and seek guidance from the regulations implementing the National Register program. In making determinations, the Department will rely on the recommendations of the National Register of Historic Places (which is located in the Department of the Interior).

Section 37.27 Purchase or Lease of new vehicles by public entities operating a demand responsive system for the general public

The NPRM proposed that recipients operating demand responsive systems buy accessible new vehicles. However, they need not do so if their demand responsive systems, when viewed in their entirety, provide equivalent levels of service to passengers with disabilities and other passengers. A demand responsive system was defined to include, for this purpose, a small city or rural system in which a significant portion of service was provided in a demand responsive mode, even if some service is provided on fixed routes.

Several transit agencies supported the NPRM provision as written. A smaller number of commenters, mostly disability groups but including a few transit agencies, said that all buses on fixed route components of mixed fixed route/demand responsive systems should be accessible, and that supplemental paratransit service should be provided for the fixed route components, just as with other fixed route systems.

A number of commenters also focused on the "equivalent service/when viewed in its entirety" standard for allowing demand responsive systems to acquire new inaccessible vehicles. Some of these commenters, mostly disability groups, said that this provision was unnecessary or counterproductive.

Others asked that the Department establish standards for equivalent service (e.g., in terms of service criteria). A number of transportation agencies suggested that the state agency administering the UMTA section 18 program for the state be designated to determine when the "equivalent service/when viewed in its entirety" test had been met.

One comment from a disability group emphasized that it would not be appropriate for demand responsive systems for the general public to provide separate service for disabled passengers. Rather, the comment said, service should be provided in an integrated fashion. Other disability group comments suggested that the rule include a DOT prior approval procedure for demand responsive systems seeking to meet the "equivalent service/when viewed in its entirety" test and a complaint procedure for alleged violations of the requirements.

Other transit agency comments mentioned problems that would occur if accessibility requirements apply to small vans, cars, or taxis (e.g., inability to put a lift on a taxi; reduction of seating capacity of vans if lifts are installed). Not all section 18 recipients operate demand responsive systems, another commenter pointed out; the commenters said that small operators should have greater flexibility regardless of the program from which they received UMTA funds. Small rural systems should be excepted from the requirement altogether, another agency suggested.

The ADA (section 224) provides that a public entity operating a demand responsive system must purchase or lease accessible new vehicles, for which a solicitation is made after August 25, 1990, unless the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities. The final rule incorporates this requirement.

As the Department construes the ADA, a demand responsive system is one that meets the essential definition of such service—that a user must request transportation service before it is rendered (see H. Rept. 101-485, Pt. 2, at 94; S.Rept. 101-116 at 54). This section applies only to such service and vehicles used in it. A vehicle used in fixed route service (even if as part of a mixed fixed route/demand responsive system) must meet the requirements of other sections for the acquisition of fixed route vehicles.

Comments asked for clarification of the concept of equivalent service, some suggesting the use of service criteria like those of the existing regulation (49 CFR part 27) for paratransit service. The legislative history the ADA is in accord with this suggestion. The "when viewed in its entirety/equivalent service" language means that "when all aspects of a transportation system are analyzed, equal opportunities for each individual with a disability to use the transportation system must exist." (H. Rept. 101-184, Pt. 2, at 95; S.Rept. 101-116 at 54). For example, both reports said, "the time delay between a phone call to access the demand responsive system and pick up the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle." (*Id.*) The House Public Works and Transportation Committee report added that

(t)he standard of a system viewed in its entirety providing equivalent service is met when an operator has, or has access to, a vehicle (including a vehicle operated in conjunction with a portable boarding assistance device) which is readily accessible to and usable by individuals with disabilities to meet the needs of such individuals on an "on-call" basis. Essentially, when all aspects of the system are analyzed, an individual with a disability must have an equivalent opportunity to use the system. (H.Rept. 101-65, Pt. 1, at 32).

In response to the comments and Congressional guidance, the rule sets forth several "service criteria" standards. These standards, which concern service area, response time, fares, hours and days of service, trip purpose restrictions, information and reservations capability, and other capacity constraints, are not absolute standards. For example, they do not say that anyone—with or without a disability—must be picked up a given number of hours after making a call for service. But they do require service to be equivalent for all passengers, whether or not they have a disability. If the system provides service to non-disabled passengers within four hours of a call for service, then passengers with disabilities must receive accessible service in four hours.

As suggested by another comment, this service must be integrated to the maximum extent feasible. It is not consistent with the ADA to provide separate service for disabled and non-disabled passengers, both of whom are, after all, members of the general public. Both, to the maximum extent feasible, should be served by the same vehicles, trips etc.

With respect to program monitoring, each demand responsive provider must certify to the State agency having responsibility for the UMTA section 18 program that it meets the equivalency test of this section and therefore is eligible to purchase inaccessible vehicles. For UMT Act recipients, the rule reflects present practice for certifications. The State agencies in question are a logical place for non-UMTA recipients to file their certifications as well. Despite the certification, the State office (or UMTA, which may review certifications on file with the State) may determine that the equivalency test has not been met, and that the entity may not acquire inaccessible vehicles.

A certification may be submitted in connection with a particular procurement. Alternatively, it may be submitted in advance (e.g., for UMTA section 18 recipients, at a convenient time in the grant application process). No certification is valid for more than a year, however. A valid certification must be on file before a public entity acquires an inaccessible vehicle.

The rule also states that the waiver mechanism concerning lifts (see § 37.21) will apply to demand responsive systems as well as fixed route systems. The Committee reports on this provision emphasized that this waiver provision was intended to apply to demand responsive systems (H.Rept. 101-485, Pt. 2, at 95; S.Rept. 101-116 at 54).

With respect to systems using small vehicles (e.g., taxis, small vans), the Department is aware, as commenters indicated, that there may be difficulty in obtaining small accessible vehicles. The ADA makes an exception to the accessible vehicle acquisition requirement for private entities providing specified transportation services, with respect to automobiles and vans with a seating capacity of less than eight persons (see Section 304(b)(3)). However, there is no such statutory exception for public entities providing either fixed route or demand responsive service. It would not be appropriate for the Department to create an exception where Congress did not. We suggest that demand responsive systems acquire sufficient accessible vehicles to meet the equivalency test, thereby allowing them to acquire additional vehicles that were not equipped with lifts or ramps.

Section 37.29 Purchase of Vehicles by Private Entities

This provision does not have a counterpart in the March 1990 NPRM, which concerned itself only with

recipients of UMTA financial assistance. The section implements Sections 302(b)(2)(B) and (C) and 304(b) and (c) of the ADA, insofar as these sections concern the acquisition of vehicles by private entities.

These provisions address a "private entity which is not primarily engaged in the business of transporting people." The "primarily engaged" test distinguishes between entities whose principal business is providing transportation (e.g., a charter bus company), and entities whose provision of transportation is tangential to their main business (e.g., airport shuttles operated by hotels, customer and employee shuttle services operated by private companies or shopping centers, shuttle operations of recreational facilities such as stadiums, ski resorts, zoos, and amusement parks. See H.Rept. 100-485, Pt. 1, at 30). It is also likely that many social service agencies and other parties which receive UMTA section 10(b)(2) funds would fall into this category.

At various points, this section applies different requirements depending on whether vehicles with a certain seating capacity are involved. As some commenters to the March 1990 NPRM pointed out, installation of lifts and wheelchair securement positions in vehicles may affect the number of persons who can actually travel in a vehicle at the same time. When the rule refers to seating capacity (e.g., with respect to a vehicle with a seating capacity in excess of 16 passengers, including the driver), the Department construes this to mean the capacity of the vehicle for passenger seating prior to accessibility modifications. Therefore, if a van can be ordered from the manufacturer with over 16 seats, it is a vehicle with a seating capacity in excess of 16 passengers, even if, after being modified to include a lift and wheelchair securement positions, the van can carry only 10 or 12 persons at a time.

Many UMTA section 10(b)(2) recipients often seek assistance for obtaining vehicles with a 16 seat or lower capacity. To the extent that these recipients fall under this section, they would not be required to purchase accessible vehicles by the ADA.

This section requires acquisition of accessible vehicles unless the system, when viewed in its entirety, provides service to individuals with disabilities equivalent to that provided other persons. For the reasons discussed in connection with § 35.29, the Department approaches this requirement by requiring equivalent service with respect to a number of service characteristics to meet this test. The one difference

between the criteria in this section and those in § 35.29 is that, for fixed route service, schedules/headways is substituted for response time. This is because the concept of response time does not apply in the fixed route context, where the key timing factor is how long a disabled passenger has to wait between vehicles, as contrasted with a non-disabled passenger.

Two provisions of this section, concerning acquisition of vans with a capacity of fewer than eight persons and the acquisition of rail passenger cars by private entities, do not begin to apply until February 25, 1992 (i.e., 19 months from the effective date of the ADA). This results from what may be an oversight in the drafting of the legislation, which failed to except the corresponding section of the ADA from the general 18 month effective date for title III of the statute. If a technical correction is passed by Congress, the Department will amend these provisions accordingly.

The provision of this section concerning remanufactured rail passenger cars, and the related provision concerning historic rail cars, are taken directly from the ADA. The feasibility language of this provision is based on the same rationale as the feasibility language of other provisions of the rule concerning historic vehicles.

Section 37.31 Interim Standards for Accessible Vehicles

The ADA requires the Department to adopt standards for accessible vehicles as part of its final ADA rules. The standards, in turn, are to be based on guidelines developed by the Architectural and Transportation Barriers Compliance Board (ATBCB), which are to be issued nine months from the statute's effective date. Pending the issuance of the final standards, this section sets forth requirements for what constitutes an accessible vehicle. This section will be replaced by the final standards as part of the projected July 1991 final ADA rule.

There are three basic requirements for vehicle accessibility. First, a long-standing UMTA regulation (49 CFR 609.15) prescribes a series of requirements for buses (e.g., concerning priority seating signs, interior handrails and stanchions, floor and step surfaces, lighting, fare collection, and destination and route signs). These requirements will apply to buses acquired by entities subject to the ADA, whether or not they receive UMTA funds. A few comments supported reference to Part 609; none opposed it.

Second, to be accessible, a vehicle needs a lift or other level change

mechanism (e.g., a ramp). It must also have sufficient clearances to allow a wheelchair user to reach a securement location. This point is obvious from the statute. Third, there must be at least one securement location. Some comments to the March NPRM urged that the Department require at least two securement locations. The Department believes that, at least on full size transit buses, more than one securement location is advisable. However, the legislative history of the ADA indicates that the number of spaces made available for wheelchairs is a determination, resting on a number of factors, that should be left up to the transit provider (see H.Rept. 101-485, Pt. 2, at 88; S. Rept. 101-116 at 54).

As indicated by a large number of comments on the NPRM's "provision of service" requirements for wheelchairs in common use, there is substantial concern by interested parties about standards for wheelchair lifts and securement devices. One of these comments was a set of recommended interim standards from the ATCB. The Department is not including any interim standards in this rule, believing that the details of these standards require additional consideration. The National Highway Traffic Safety Administration (NHTSA) and UMTA are both working on projects that bear on the development of lift and securement standards, and work on related standards by such bodies as the Canadian Standards Association and International Standards Organization is also under way. Between now and the publication of a final ADA rule, the Department will work with the ATCB and other concerned organizations to bring this work together and develop as complete and reasonable a set of standards as possible.

Subpart C—Rapid and Light Rail Systems

The requirements for vehicle acquisition for rapid and light rail systems parallel those for buses, vans and other vehicles. The regulatory requirements closely follow the statute, with the Department exercising its discretion on such issues as good faith efforts for used vehicles, feasibility for remanufactured vehicles, and historic vehicles in a manner parallel to the way those same issues are resolved in the bus and van context. (With respect to the historic vehicles provision, please note the questions about the scope of this provision discussed under section 37.25, which may also apply in the rail context.) As an interim measure, before

the development of standards based on ATCB guidelines, light and rapid rail vehicles will be viewed as accessible if they meet existing applicable requirements of 49 CFR part 609.

This subpart will eventually include facility and other requirements of the ADA as applied to light and rapid rail systems. Provisions on these subject will be proposed in a subsequent NPRM.

Subpart D—Intercity and Commuter Rail Service

With some exceptions (e.g., the application of accessibility requirements to a remanufactured vehicle whose life is extended for ten, rather than five, years), the requirements for vehicle acquisition for intercity and commuter rail systems parallel those for buses, vans and other vehicles, as well as for rapid and light rail vehicles. The regulatory requirements closely follow the statute, with the Department exercising its discretion on such issues as good faith efforts for used vehicles and feasibility for remanufactured vehicles in a manner parallel to the way those same issues are resolved in other parts of the regulation.

Again, the rule provides interim standards for commuter and intercity rail vehicle accessibility, pending the adoption of standards based on ATCB guidelines. These standards are derived from the Department's existing section 504 rule (49 CFR 27.73(b)(2)), as suggested by the Report of the House Committee on Energy and Commerce (H.Rept. 101-485, Pt. 4, at 46, 50). These standards are modified for intercity and commuter rail cars as provided in the text of the statute, as well as incorporating guidance from the House Committee on Energy and Commerce concerning the avoidance of requirements for widening aisles (*Id.*).

In § 37.87(b), there is a reference to compliance with § 242(a)(3) of the ADA. The ADA provides that single-level intercity rail passenger cars need comply with accessibility standards (set forth in § 37.87(a) of this rule) to the extent necessary to meet the "number of wheelchair spaces in a train" requirements of the cited statutory section. The accessible rest room and boarding requirements apply only to those coaches on which the required spaces are found.

This subpart will eventually include facility and other requirements of the ADA as applied to intercity and commuter rail systems. Provisions on these subjects will be proposed in a subsequent NPRM.

Regulatory Process Matters

This rule is a major rule under executive Order 12291. Cost pertaining to subpart B are estimated to be in the range of \$72-78 million per year. An analysis of these costs, derived from a study prepared by the Department's consultant for a study of the impacts of the March 1990 NPRM, has been placed in the docket. The Department has not analyzed rail vehicle acquisition costs. Rail vehicle requirements must be in this rule since the statute requires the purchase of accessible rail vehicles after August 25, 1990. There is a good chance that these costs, which are imposed by the requirements of the ADA itself, would push the total annual cost of the rule over the \$100 million threshold for a major rule. The rule is also significant under the Department's Regulatory Policies and Procedures.

The rule may have a significant impact on a substantial number of small entities, both public and private transit providers who will have to begin acquiring accessible vehicles. This impact is required by statute, however, and the Department does not have the discretion under the ADA to lessen the requirements. Likewise, there is a Federalism impact, in the sense that the statute, and hence the rule, decides vehicle acquisition issues that previously could be decided at the state or local level. Because this impact is required by the statute, a Federalism assessment, like a Regulatory Flexibility Analysis, is not necessary. Information collection requirements have been submitted to OMB for clearance under the Paperwork Reduction Act.

A number of provisions of this rule (e.g., pertaining to acquisition of vehicles by entities that do not receive UMTA funds and to rail systems) were not the subject of a previous notice and opportunity for public comment. These provisions pertain to provisions in the ADA that require regulated parties to acquire accessible vehicles after August 25, 1990. The Department has determined that it would be unnecessary, impracticable, and contrary to the public interest to postpone regulatory implementation of these statutory provisions in order to issue a proposed rule on these subjects. Likewise, the Department is making the entire final rule effective immediately, without the normal 30-day delayed effective date. The good cause for this reason is the same: the rule implements statutory mandates which have effect August 25, 1990, the postponement of the effective date of the rule would not postpone the obligation of the regulated parties to comply with the basic

provisions of the rule. At the same time, regulated parties need definitive guidance concerning the details of implementing these requirements.

The Department is requesting comment for 90 days on the provisions of this rule. As discussed above, many of the provisions of this rule have already been the subject of notice and comment (i.e., provisions with respect to the acquisition of vehicles, and related issues, by recipients of UMTA financial assistance). Requirements with respect to private entities and others not receiving UMTA funds and requirements pertaining to rail systems have not previously been the subject of notice and comment. For the convenience of commenters, the Department will accept comments on all provisions of the rule, though the Department's focus in reviewing the comments will be on those areas which have not previously been the subject of comment. Unless it appears that immediate changes are necessary in one or more provisions, the Department intends to respond to this round of comments in the final ADA rule scheduled to be issued in July 1991.

List of Subjects in 49 CFR Part 37

Mass transportation, Railroads, Civil rights, Handicapped.

Issued this 28th day of September 1990, at Washington, DC.

Samuel K. Skinner,

Secretary of Transportation.

For the reasons set forth in the preamble, title 49 of the Code of Federal Regulations is amended to read as follows:

1. Part 37 of title 49, Code of Federal Regulations, is added to read as follows:

PART 37—TRANSPORTATION SERVICES FOR INDIVIDUALS WITH DISABILITIES

Subpart A—General

Sec.

37.1 Purpose.

37.3 Applicability.

37.5 Definitions.

37.7 Nondiscrimination; Provision of Service.

37.9-37.19 [Reserved]

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37.89 Interim Accessibility Standards for Commuter Rail Cars.

37.91–37.111 [Reserved]

Appendix to Part 37—Certification of Equivalent Service

Authority: Americans with Disabilities Act of 1990, Pub. L. 101–336; 49 U.S.C. 322.

Subpart A—General.

§ 37.1 Purpose.

The purpose of this part is to implement the transportation and related provisions of the Americans with Disabilities Act of 1990 (Pub. L. 101–336).

§ 37.3 Applicability.

(a) This part applies to the following entities, whether or not they receive Federal financial assistance from the Department of Transportation:

(1) Any public entity that provides designated public transportation or intercity or commuter rail transportation;

(2) Any private entity that provides specified public transportation; and

(3) Any private entity that is not in the principal business of transporting people but operates a demand responsive or fixed route system or otherwise transports individuals.

(b) Those who contract with a UMT Act recipient or other to provide designated public transportation or

intercity or commuter rail transportation service (including a private entity which might otherwise be subject to the private entity provisions of this part) are subject to the public entity provisions of this part.

(c) For entities receiving Federal financial assistance from the Department of Transportation, compliance with applicable requirements of this part is a condition of receiving the financial assistance. This obligation is enforced under the provisions of 49 CFR part 27, not under this part.

§ 37.5 Definitions.

As used in this part:

“The Act” means the Americans with Disabilities Act of 1990 (Pub. L. 101–336), as it may be amended from time to time.

“Auxiliary aids and services”

includes:

(a) Qualified interpreters or other methods of making aurally delivered materials available to individuals with hearing impairments;

(b) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(c) Acquisition or modification of equipment or devices; or

(d) Other similar services or actions.

Commerce means travel, trade, transportation, or communication among the several states, between any foreign country or any territory or possession and any state, or between points in the same state but through another state or foreign country.

Commuter authority means any state, local, regional authority, corporation, or other entity established for purposes of providing commuter rail transportation (including, but not necessarily limited to, the New York Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Massachusetts Bay Transportation Authority, the Port Authority Trans-Hudson Corporation, and any successor agencies) and any entity created by one or more such agencies for the purposes of operating, or contracting for the operation of, commuter rail transportation.

Commuter rail transportation means short-haul rail passenger service operating in metropolitan and suburban areas, whether within or across the geographical boundaries of a state, usually characterized by reduced fare, multiple ride, and commutation tickets

and by morning and evening peak period operations. This term does not include light or rapid rail transportation.

Commuter rail car means a rail passenger car obtained by a commuter authority for use in commuter rail transportation.

Demand-responsive system means any system of transporting individuals, including but not limited to providing designated public transportation service or specified public transportation service by vehicle at the request of the user, which is not a fixed route system.

Designated public transportation means transportation provided by a public entity (other than public school transportation) by bus, rail, or other conveyance (other than transportation by aircraft or intercity or commuter rail transportation) that provides the general public with general or special service, including charter service, on a regular and continuing basis.

Disability means, with respect to an individual—

(a) A permanent or temporary physical or mental impairment that substantially limits one or more of the major life functions of such individual. For purposes of this part, a physical or mental impairment means

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, or endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction (but not including the current use of illegal drugs) and alcoholism. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; or

(b) A record of such an impairment. For purposes of this part, a record of an impairment means a history of, or classification or misclassification, as having a mental or physical impairment that substantially limits one or more major life activities; or

(c) Being regarded as having such an impairment. For purposes of this part, this term means

(1) Having a physical or mental impairment that does not substantially limit major life activities, but which is treated as constituting such a limitation;

(2) Having a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(3) Having none of the impairments set forth in this definition but being treated as having such an impairment.

Fixed route system means a system of transporting individuals (other than by aircraft), including but not limited to providing designated or specified public transportation services, on which a vehicle (including a bus, van, rail vehicle, or other vehicle) is operated along a prescribed route according to a fixed schedule and which does not involve an advance request by a passenger to ensure that service is provided.

Intercity rail transportation means transportation provided by the National Rail Passenger Corporation (Amtrak).

Intercity rail passenger car means a rail passenger car obtained by Amtrak for use in intercity rail transportation.

New vehicle means a vehicle which is offered for sale or lease after manufacture without any prior use.

Operates includes, with respect to a fixed route or demand responsive system, the provision of transportation service by the public entity itself or by a person under a contractual or other arrangement or relationship with a public entity.

Over-the-road bus means a vehicle characterized by an elevated passenger deck located over a baggage compartment.

Private entity means any entity other than a public entity.

Public entity means:

(a) Any state or local government;

(b) Any department, agency, special purpose district, or other instrumentality of one or more state or local governments; and

(c) The National Railroad Passenger Corporation (Amtrak) and any commuter authority.

Purchase or lease with respect to vehicles, means the time at which an entity is legally obligated to obtain the vehicles, such as the time of contract execution.

Public school transportation means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Remanufactured vehicle means a vehicle which has been structurally restored and has had new or rebuilt major components installed to extend its service life.

Secretary means the Secretary of Transportation or his/her designee.

Solicitation means the closing date for the submission of bids or offers in a procurement.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than aircraft) provided by a private entity to the general public, with general or special service (including charter service) on a regular and continuing basis.

UMTA Act means the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. App. 1601 *et seq.*).

Used vehicle means a vehicle with prior use that was originally purchased before June 26, 1990.

Vehicle as the term is applied to private entities, does not include a rail passenger car, railroad locomotive, railroad freight car, or railroad caboose, or other rail rolling stock described in section 242 or title III of the Act.

§ 37.7 Nondiscrimination; provision of service.

(a) No public or private entity shall discriminate against an individual with disabilities in connection with the provision of its transportation service for the general public.

(b) Notwithstanding the provision of any special service to individuals with disabilities, a public or private entity shall not, on the basis of disability, deny to any individual with a disability the opportunity to use the entity's transportation system for the general public, if the individual is capable of using that system.

(c) Each covered entity shall ensure that vehicles and equipment are capable of accommodating all the users for which the service is designed, and are maintained in proper operating condition.

(d) Each covered entity shall ensure that personnel are trained and supervised so that they operate vehicles and equipment safely and properly and treat individuals with disabilities who

use the service in a courteous and respectful way.

(e) Each covered entity shall ensure that adequate assistance and information concerning the service is available to individuals with disabilities, including those with vision or hearing impairments. This obligation includes making adequate communications capacity to enable users to obtain information about and, with respect to demand responsive service, to schedule service. In the case of a fixed route system, this obligation includes providing information about bus routes and schedules and the accessibility of scheduled service.

(f) Each entity providing demand responsive service shall ensure that service is provided in a timely manner, in accordance with scheduled pickup times.

§§ 37.9-37.19 (Reserved)

Subpart B—Bus, Van, and Other Transportation Systems

§ 37.21 Purchase or lease of new vehicles by public entities operating fixed route systems.

(a) Except as provided elsewhere in this section, each public entity operating a fixed route system making a solicitation after August 25, 1990, to purchase or lease a new bus or other new vehicle for use on the system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of § 37.31 of this subpart.

(b) A public entity may purchase or lease a new bus that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if it applies for, and the UMTA Administrator grants, a waiver as provided for in this section.

(c) Before submitting a request for such a waiver, the public entity shall hold at least one public hearing concerning the proposed request.

(d) The UMTA Administrator may grant a request for such a waiver if the public entity demonstrates to the UMTA Administrator's satisfaction that—

(1) The initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) Hydraulic, electromechanical, or other lifts for such new buses could not be provided by any qualified lift manufacturer to the manufacturer of

such new buses in sufficient time to comply with the solicitation; and

(3) Any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(e) The public entity shall include with its waiver request a copy of the initial solicitation and written documentation from the bus manufacturer of its good faith efforts to obtain lifts in time to comply with the solicitation, and a full justification for the assertion that the delay in bus procurement needed to obtain a lift-equipped bus would significantly impair transportation services in the community. This documentation shall include a specific date at which the lifts could be supplied and copies of advertisements in trade publications and inquiries to trade associations seeking lifts.

(f) Any waiver granted by the UMTA Administrator under this section shall be subject to the following conditions:

(1) The waiver shall apply only to the particular bus delivery to which the waiver request pertains;

(2) The waiver shall include a termination date, which will be based on information concerning when lifts will become available for installation on the new buses the public entity is purchasing. Buses delivered after this date, even though procured under a solicitation to which a waiver applied, shall be equipped with lifts;

(3) Any bus obtained subject to the waiver shall be capable of accepting a lift, and the public entity shall install a lift as soon as one becomes available;

(4) Such other terms and conditions as the UMTA Administrator may impose.

(g)(1) When the UMTA Administrator grants a waiver under this section, he/she shall promptly notify the appropriate committees of Congress.

(2) If the UMTA Administrator has reasonable cause to believe that a public entity fraudulently applied for a waiver under this section, the UMTA Administrator shall:

(i) Cancel the waiver if it is still in effect; and

(ii) Take other appropriate action.

§ 37.23 Purchase or lease of used vehicles by public entities operating a fixed route system.

(a) Except as provided elsewhere in this section, each public entity operating a fixed route system purchasing or leasing, after August 25, 1990, a used bus or other used vehicle for use on the system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a

vehicle shall meet the requirements of § 37.31 of this subpart.

(b) A public entity may purchase or lease a used vehicle for use on its fixed route system that is not readily accessible to and usable by individuals with disabilities if it makes demonstrated good faith efforts to obtain an accessible vehicle.

(c) Good faith efforts shall include at least the following steps:

(1) An initial solicitation for used vehicles specifying that all used vehicles are to be lift-equipped and otherwise accessible to and usable by individuals with disabilities, or, if an initial solicitation is not used, a documented communication so specifying;

(2) A nationwide search for accessible vehicles, involving specific inquiries to used vehicle dealers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Each public entity purchasing or leasing used vehicles that are not readily accessible to and usable by individuals with handicaps shall retain documentation of the specific good faith efforts it made for two years from the date the vehicles were purchased. These records shall be made available, on request, to the UMTA Administrator and the public.

§ 37.25 Remanufacture of vehicles and purchase or lease of remanufactured vehicles by public entities operating fixed route systems.

(a) This section applies to any public entity operating a fixed route system which takes one of the following actions:

(1) After August 25, 1990, remanufactures a bus or other vehicle so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing; or

(2) Purchases or leases a bus or other vehicle which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after August 25, 1990, and during the period in which the useful life of the vehicle is extended.

(b) Vehicles acquired through the actions listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as provided in § 37.31 of this subpart.

(c) For purposes of this section, it shall be considered feasible to remanufacture a bus or other motor so as to be readily accessible to and usable by individuals with disabilities, including individuals who use

wheelchairs, unless an engineering analysis demonstrates that including accessibility features required by § 37.31 of this subpart would have a significant adverse effect on the structural integrity of the vehicle.

(d) If a public entity operates a fixed route system, any segment of which is included on the National Register of Historic Places, and if making a vehicle of historic character used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity has only to make (or purchase or lease a remanufactured vehicle with) those modifications to make the vehicle accessible which do not alter the historic character of such vehicle, in consultation with the National Register of Historic Places.

(e) Pending the issuance of regulations defining a vehicle of historic character, a public entity operating a fixed route system as described in paragraph (d) of this section may apply in writing to the UMTA Administrator for a determination of the historic character of the vehicle. The UMTA Administrator shall refer such requests to the National Register of Historic Places, and shall rely on its advice in making determinations of the historic character of the vehicle.

§ 37.27 Purchase or lease of new vehicles by public entities operating a demand responsive system for the general public.

(a) Except as provided in this section, a public entity operating a demand responsive system for the general public making a solicitation after August 25, 1990, to purchase or lease a new bus or other new vehicle for use on the system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of § 37.31 of this subpart.

(b) If the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities, it may purchase new vehicles that are not readily accessible to and usable by individuals with disabilities.

(c) For purposes of this section, a demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most integrated

setting feasible and is equivalent to the service provided other individuals with respect to the following service characteristics:

- (1) Response time;
- (2) Fares;
- (3) Geographic area of service;
- (4) Hours and days of service;
- (5) Restrictions based on trip purpose;
- (6) Availability of information and reservations capability; and
- (7) Any constraints on capacity or service availability.

(d) A public entity receiving UMTA funds under section 18 or 16(b)(2), or which does not receive UMTA funds, which determines that its service to individuals with disabilities is equivalent to that provided other persons, shall, prior to any procurement of an inaccessible vehicle, file with the appropriate state program office a certification that it provides equivalent service meeting the standards of paragraph (c) of this section. (Public entities operating demand responsive service receiving funds under any other section shall file the certification with the appropriate UMTA regional office.) Such a certification may be filed in connection with a particular procurement or in advance of a procurement; however, no certification shall be valid for more than one year. A copy of the required certification is found in the Appendix to this part.

(e) The waiver mechanism set forth in § 37.21 (b)-(h) of this subpart shall be available to public entities operating a demand responsive system for the general public.

§ 37.29 Purchase of Vehicles by Private Entities.

(a)(1) A private entity which is not primarily engaged in the business of transporting people, which operates a fixed route system, and which makes a solicitation after August 25, 1990, to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of § 37.31 of this subpart.

(2) A private entity which is not primarily engaged in the business of transporting people and which operates a fixed route system shall not purchase or lease a vehicle, after August 25, 1990, with a seating capacity of 16 passengers or less (including the driver) for use on the system that is not readily accessible to and usable by individuals with disabilities, including individuals who

use wheelchairs, and which meets the requirements of § 37.31 of this subpart, unless the system, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals with disabilities. For purposes of this paragraph, a fixed route system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most integrated setting feasible and is equivalent to the service provided other individuals with respect to the following service characteristics:

- (i) Schedules/headways;
- (ii) Fares;
- (iii) Geographic area of service;
- (iv) Hours and days of service;
- (v) Availability of information; and
- (vi) Any constraints on capacity or service availability.

(3) A private entity which is not primarily engaged in the business of transporting people and whose operations affect commerce, and which operates a demand responsive system, shall not make a solicitation, after August 25, 1990, to purchase or lease a new vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on its system that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as provided in § 37.31 of this Subpart, unless its system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, that is equivalent to the level of service provided to individuals without disabilities. For purposes of this paragraph, this equivalent service requirement shall be deemed to have been met if service to individuals with disabilities is provided in the most integrated setting feasible and is the same as or fully equivalent to the service provided other individuals with respect to the following service characteristics:

- (i) Response time;
- (ii) Fares;
- (iii) Geographic area of service;
- (iv) Hours and days of service;
- (v) Restrictions based on trip purpose;
- (vi) Availability of information and reservations capability; and
- (vii) Any constraints on capacity or service availability.

(b)(1) Except as provided in this paragraph, a private entity which is primarily engaged in transporting people and whose operations affect commerce,

which makes a solicitation after August 25, 1990, to purchase or lease a new vehicle (other than an automobile, a van with a seating capacity of less than eight persons, including the driver, or an over-the-road bus) for use in providing specified public transportation on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of § 37.31 of this Subpart.

(2) The entity may purchase such a new vehicle that is not readily accessible to and usable by individuals with disabilities if the vehicle is to be used solely on a demand responsive system and the entity can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities. For purposes of this paragraph, a demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most integrated setting feasible and is equivalent to the service provided other individuals with respect to the following service characteristics:

- (i) Response time;
- (ii) Fares;
- (iii) Geographic area of service;
- (iv) Hours and days of service;
- (v) Restrictions based on trip purpose;
- (vi) Availability of information and reservations capability; and
- (vii) Any constraints on capacity or service availability.

(c)(1) Except as provided in this paragraph, a private entity which is primarily engaged in transporting people and whose operations affect commerce, which makes a solicitation after February 25, 1992, to purchase or lease a new van with a seating capacity of less than eight persons, including the driver, for use in providing specified public transportation on the entity's system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of § 37.31 of this Subpart.

(2) The entity may purchase such a new van that is not readily accessible to and usable by individuals with disabilities, if the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to individuals with disabilities,

including individuals who use wheelchairs, equivalent to the level of service it provides to individuals with out disabilities. For purposes of this paragraph, the system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most integrated setting feasible and is the same as or fully equivalent to the service provided other individuals with respect to the following service characteristics:

(i) Response time (if the system is demand responsive) or schedules/headways (if the system is a fixed route system);

(ii) Fares;

(iii) Geographic area of service;

(iv) Hours and days of service;

(v) Restrictions based on trip purpose;

(vi) Availability of information and reservations capability; and

(vii) Any constraints on capacity or service availability.

(d) A private entity which is primarily engaged in transporting people and whose operations affect commerce, which makes a solicitation after February 25, 1992, to purchase or lease a new rail passenger car to be used in providing specified public transportation, shall ensure that the car is readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs. The accessibility standards of either § 37.57, 37.87, or 37.89 shall apply to such a car, depending on the type of service in which the car is to be used.

(e) Except as provided paragraph (f) of this section, a private entity which is primarily engaged in transporting people and whose operations affect commerce, which remanufactures a rail passenger car to be used in providing specified public transportation to extend its useful life for ten years or more, or purchases or leases such a remanufactured rail car, shall ensure that the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. For purposes of this paragraph, it shall be considered feasible to remanufacture a rail passenger car to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that doing so would have a significant adverse effect on the structural integrity of the car.

(f) Compliance with paragraph (e) of this section is not required to the extent that it would significantly alter the historic or antiquated character of a

historic or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in the violation of any rule, regulation, standard or order issued by the Secretary under the Federal Railroad Safety Act of 1970. For purposes of this section, a historic or antiquated rail passenger car means a rail passenger car—

(1) Which is not less than 30 years old at the time of its use for transporting individuals;

(2) The manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(3) Which—

(i) Has a consequential association with events or persons significant to the past; or

(ii) Embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

§ 37.31 Interim standards for accessible vehicles.

(a) Pending the issuance of accessibility standards required by the Act, vehicles leased or purchased by public or private entities shall not be deemed readily accessible to and usable by individuals with disabilities, including individuals with wheelchairs, unless they meet the standards set forth in this section.

(b) The vehicle shall meet the requirements of 49 CFR 609.15(d)-(i);

(c) The vehicle shall be equipped with a lift or other level-change mechanism and shall have sufficient clearances to permit an individual using a wheelchair or other mobility device to reach a securement location;

(d) There shall be at least one securement location on the vehicle. The securement device(s) at the securement location shall be sufficient to secure any wheelchair or other mobility device which the vehicle's lift and clearances permit to enter the vehicle and proceed to the securement location.

§§ 37.33—37.49 [Reserved]

Subpart C—Rapid and Light Rail Systems

§ 37.51 Purchase or lease of new rail vehicles by public entities operating rapid or light rail systems.

Each public entity operating a rapid or light rail system making a solicitation after August 25, 1990, to purchase or lease a new rapid or light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities,

including individuals who use wheelchairs.

§ 37.53 Purchase or lease of used rail vehicles by public entities operating rapid or light rail systems.

(a) Except as provided elsewhere in this section, each public entity operating a rapid or light rail system which, after August 25, 1990, purchases or leases a used rapid or light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) A public entity may purchase or lease a used rapid or light rail vehicle for use on its rapid or light rail system that is not readily accessible to and usable by individuals if it makes demonstrated good faith efforts to obtain an accessible vehicle.

(c) Good faith efforts shall include at least the following steps:

(1) The initial solicitation for used vehicles made by the public entity specifying that all used vehicles were to be accessible to and usable by individuals with disabilities;

(2) A nationwide search for accessible vehicles, involving specific inquiries to manufacturers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Each public entity purchasing or leasing used rapid or light rail vehicles that are not readily accessible to and usable by individuals with disabilities shall retain documentation of the specific good faith efforts it made for two years from the date the vehicles were purchased. These records shall be made available, on request, to the UMTA Administrator.

§ 37.55 Remanufacture of rail vehicles and purchase or lease of remanufactured rail vehicles by public entities operating rapid or light rail systems.

(a) This section applies to any public entity operating a rapid or light rail system which takes one of the following actions:

(1) After August 25, 1990, remanufactures a light or rapid rail vehicle so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing;

(2) Purchases or leases a light or rapid rail vehicle which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after August 25, 1990, and during the period in which the useful life of the vehicle is extended.

(b) Vehicles acquired through the actions listed in paragraph (a) of this

section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as provided in § 37.57 of this subpart.

(c) For purposes of this section, it shall be considered feasible to remanufacture a rapid or light rail vehicle so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that doing so would have a significant adverse effect on the structural integrity of the vehicle.

(d) If a public entity operates a rapid or light rail system any segment of which is included on the National Register of Historic Places and if making a rapid or light rail vehicle of historic character used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity need only make (or purchase or lease a remanufactured vehicle with) those modifications that do not alter the historic character of such vehicle.

(e) Pending the issuance of regulations defining a rapid or light rail vehicle of historic character, a public entity operating a fixed route system as described in paragraph (d) of this section may apply in writing to the UMTA Administrator for a determination of the historic character of the vehicle. The UMTA Administrator shall make such determinations on a case by case basis, in consultation with the National Register of Historic Places.

§ 37.57 Interim accessibility standards for light and rapid rail vehicles.

Pending the issuance of accessibility standards for light and rapid rail vehicles required by the Act, light and rapid rail vehicles shall be deemed readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, for purposes of this subpart if they meet the requirements of 49 CFR 609.19 and 609.17, respectively.

§§ 37.59—37.79 [Reserved].

Subpart D—Intercity and Commuter Rail Systems

§ 37.81 Purchase or lease of new intercity and commuter rail cars.

Amtrak or a commuter authority making a solicitation after August 25, 1990, to purchase or lease a new intercity or commuter rail car for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including

individuals who use wheelchairs. Such a vehicle shall meet the requirements of §§ 37.87 or 37.89 of this subpart, as applicable.

§ 37.83 Purchase or lease of used intercity and commuter rail cars.

(9) Except as provided elsewhere in this section, Amtrak or a commuter authority purchasing or leasing a used intercity or commuter rail car after August 25, 1990, shall ensure that the car is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Such a vehicle shall meet the requirements of §§ 37.87 or § 37.89 of this subpart, as applicable.

(b) Amtrak or a commuter authority may purchase or lease a used intercity or commuter rail car that is not readily accessible to and usable by individuals if it makes demonstrated good faith efforts to obtain an accessible vehicle.

(c) Good faith efforts shall include at least the following steps:

(1) An initial solicitation for used vehicles specifying that all used vehicles accessible to and usable by individuals with disabilities;

(2) A nationwide search for accessible vehicles, involving specific inquiries to used vehicle dealers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Amtrak and commuter authorities purchasing or leasing used intercity or commuter rail cars that are not readily accessible to and usable by individuals with disabilities shall retain documentation of the specific good faith efforts that were made for two years from the date the cars were purchased. These records shall be made available, on request, to the UMTA or FRA Administrator, as applicable.

§ 37.85 Remanufacture of intercity and commuter rail cars and purchase or lease of remanufactured intercity and commuter rail cars.

(a) This section applies to Amtrak or a commuter authority which takes one of the following actions:

(1) Remanufactures an intercity or commuter rail car so as to extend its useful life for ten years or more;

(2) Purchases or leases an intercity or commuter rail car which has been remanufactured so as to extend its useful life for ten years or more.

(b) Intercity and commuter rail cars listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as

provided in § 37.87 or § 37.89 of this subpart, as applicable.

(c) For purposes of this section, it shall be considered feasible to remanufacture an intercity or commuter rail car so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that including accessibility features required by §§ 37.87 or 37.89 of this subpart, as applicable, would have a significant adverse effect on the structural integrity of the car.

§ 37.87 Interim accessibility standards for intercity rail passenger cars.

(a) Pending the issuance of regulations under section 244 of the ADA, and except as provided in this section, intercity rail passenger cars shall meet the following standards to be considered readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs:

(1) The car shall be able to be entered from the station platform by an individual who uses a wheelchair or other mobility device;

(2) The car shall include space to park and secure one or two (but not more than two) wheelchairs to accommodate persons who wish to remain in their wheelchairs, and space to fold and store one or two (but not more than two) wheelchairs to accommodate individuals who wish to sit in coach seats;

(3) The car shall include an accessible rest room with a wide doorway, bars to assist the individual in transferring from wheelchair to toilet, low sinks, and other appropriate modifications. The rest room shall be large enough to accommodate a wheelchair (including maneuvering room);

(4) The design and construction of the car shall be accessible to individuals with disabilities, including but not limited to individuals using wheelchairs, and shall display the international accessibility symbol at each entrance;

(5) Widening of aisles or passageways in the car to accommodate wheelchairs is not required.

(b) Single-level passenger coaches (including food service cars) are required to comply with the requirements of paragraphs (a)(1)–(4) of this section only to the extent necessary to ensure compliance with the requirements of sections 242(a)(3) of the ADA.

(c) Single level dining cars shall not be required to be able to be entered from the station platform by an individual who uses a wheelchair or to have a rest

room usable by an individual who uses a wheelchair if no rest room is provided in such car for any passenger.

(d) Bi-level dining cars shall not be required to meet the requirements of paragraphs (a)(1)-(4) of this section.

§ 37.99 Interim accessibility standards for commuter rail cars.

Pending the issuance of regulations under section 244 of the Act, and except as provided in this section, commuter rail cars shall meet the following standards in order to be considered readily accessible to and useable by individuals with disabilities, including individuals who use wheelchairs;

(a) The car shall be able to be entered from the station platform by an individual who uses a wheelchair or other mobility device;

(b) The car shall include space to park and secure one or more wheelchairs to accommodate persons who wish to remain in their wheelchairs;

(c) If a rest room is provided for passengers in the car, the car shall include an accessible rest room with a wide doorway, bars to assist the individual in transferring from wheelchair to toilet, low sinks, and other appropriate modifications. The rest room shall be large enough to accommodate wheelchairs (including maneuvering room);

(d) The design and construction of the car shall be accessible to individuals with disabilities, including but not limited to individuals using wheelchairs, and shall display the international accessibility symbol at each entrance;

(e) Widening of aisles or passageways in the car to accommodate wheelchairs is not required.

§§ 37.91-37.111 [Reserved]

Appendix to Part 37

Certification of Equivalent Service

The _____ (name of agency) certifies that its demand responsive service offered to individuals with disabilities, including individuals who use wheelchairs, is equivalent to the level and quality of service offered to individuals without disabilities. Such service, when viewed in its entirety, is provided in the most integrated setting feasible and is equivalent with respect to:

- (1) Response time;
- (2) Fares;
- (3) Geographic service area;
- (4) Hours and days of service;
- (5) Restrictions on trip purpose;
- (6) Availability of information and reservation capability; and
- (7) Constraints on capacity or service availability.

In accordance with 49 CFR 37.27, public entities operating demand responsive systems for the general public which receive financial assistance under sections 16(b)(2) or 18 of the Urban Mass Transportation Act) must file this certification with the appropriate state program office before procuring any inaccessible vehicle. Such public entities not receiving UMTA funds shall also file the certification with the appropriate state program office. Such public entities receiving UMTA funds under any other section of the UMT Act must file the certification with the appropriate UMTA regional office. This certification is valid for no longer than one year from its date of filing.

(name of authorized official)

(signature)

(title)

(date)

[FR Doc. 80-23439 Filed 10-3-80; 8:45 am]

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SCHOOL BOARD OF NASSAU COUNTY,
FLORIDA, ET AL. v. ARLINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 85-1277. Argued December 3, 1986—Decided March 3, 1987

Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 (Act), provides, *inter alia*, that no "otherwise qualified handicapped individual," as defined in 29 U. S. C. § 706(7), shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. Section 706(7)(B) defines "handicapped individual" to mean any person who "(i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Department of Health and Human Services (HHS) regulations define "physical impairment" to mean, *inter alia*, any physiological disorder affecting the respiratory system, and define "major life activities" to include working. Respondent was hospitalized for tuberculosis in 1957. The disease went into remission for the next 20 years, during which time respondent began teaching elementary school in Florida. In 1977, March 1978, and November 1978, respondent had relapses, after the latter two of which she was suspended with pay for the rest of the school year. At the end of the 1978-1979 school year, petitioners discharged her after a hearing because of the continued recurrence of tuberculosis. After she was denied relief in state administrative proceedings, she brought suit in Federal District Court, alleging a violation of § 504. The District Court held that she was not a "handicapped person" under the Act, but that, even assuming she were, she was not "qualified" to teach elementary school. The Court of Appeals reversed, holding that persons with contagious diseases are within § 504's coverage, and remanded for further findings as to whether respondent was "otherwise qualified" for her job.

Held:

1. A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of § 504. Pp. 280-286.

(a) Respondent is a "handicapped individual" as defined in § 706(7)(B) and the HHS regulations. Her hospitalization in 1957 for a disease that affected her respiratory system and that substantially limited "one or more of [her] major life activities" establishes that she has a "record of . . . impairment." Pp. 280-281.

(b) The fact that a person with a record of impairment is also contagious does not remove that person from § 504's coverage. To allow an employer to justify discrimination by distinguishing between a disease's contagious effects on others and its physical effects on a patient would be unfair, would be contrary to § 706(7)(B)(iii) and the legislative history, which demonstrate Congress' concern about an impairment's effect on others, and would be inconsistent with § 504's basic purpose to ensure that handicapped individuals are not denied jobs because of the prejudice or ignorance of others. The Act replaces such fearful, reflexive reactions with actions based on reasoned and medically sound judgments as to whether contagious handicapped persons are "otherwise qualified" to do the job. Pp. 281-286.

2. In most cases, in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under § 504, the district court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (*e. g.*, how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. Courts must then determine, in light of these findings, whether any "reasonable accommodation" can be made by the employer under the established standards for that inquiry. Pp. 287-288.

3. Because the District Court did not make appropriate findings, it is impossible for this Court to determine whether respondent is "otherwise qualified" for the job of elementary school teacher, and the case is remanded for additional findings of fact. Pp. 288-289.

772 F. 2d 759, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 289.

Brian T. Hayes argued the cause for petitioners. With him on the briefs was *John D. Carlson*.

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds*, *Deputy*

Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Richard J. Lazarus, and Mark L. Gross.

*George K. Rahdert argued the cause for respondent. With him on the brief was Steven H. Malone.**

JUSTICE BRENNAN delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (Act), prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell, and Thomas R. Bagby*; and for Congressman William E. Dannemeyer et al. by *William E. Dannemeyer, pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Association for Retarded Citizens of the United States et al. by *Thomas K. Gilhool, Michael Churchill, Frank J. Laski, Timothy M. Cook, Stanley S. Herr, and Donald S. Goldman*; and for the Employment Law Center et al. by *Robert E. Borton*.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, and Marian M. Johnston and M. Anne Jennings, Deputy Attorneys General*, and by the Attorneys General for their respective States as follows: *Stephen H. Sachs of Maryland, Frank J. Kelley of Michigan, Hubert H. Humphrey III of Minnesota, W. Cary Edwards of New Jersey, Robert Abrams of New York, and Bronson C. La Follette of Wisconsin*; for the American Medical Association by *Benjamin W. Heineman, Jr., and Carter G. Phillips*; for the American Public Health Association et al. by *Nan D. Hunter and Herbert Semmel*; for Doctors for AIDS Research and Education by *Stanley Fleishman, Joseph Lawrence, Susan D. McGreivy, and Paul Hoffman*; for the Epilepsy Foundation of America by *Alexandra K. Finucane*; for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber, and Thomas A. Shannon*; and for Senator Cranston et al. by *Arlene Mayerson*.

I

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated § 504 of the Act.¹

A trial was held in the District Court, at which the principal medical evidence was provided by Marianne McEuen, M.D., an assistant director of the Community Tuberculosis Control Service of the Florida Department of Health and Rehabilitative Services. According to the medical records reviewed by Dr. McEuen, Arline was hospitalized for tuberculosis in 1957. App. 11-12. For the next 20 years, Arline's disease was in remission. *Id.*, at 32. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive. *Id.*, at 12.

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. *Id.*, at 49-51. At the end of the 1978-1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurrence [*sic*] of tuberculosis." *Id.*, at 49-52.

In her trial memorandum, Arline argued that it was "not disputed that the [school board dismissed her] solely on the basis of her illness. Since the illness in this case qualifies the

¹ Respondent also sought relief under 42 U. S. C. § 1983, alleging that the board denied her due process of law. Both the District Court and the Court of Appeals rejected this argument, and respondent did not present the issue to this Court.

Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504." Record 119. The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute." App. to Pet. for Cert. C-2. The court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school. *Id.*, at C-2-C-3.

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls . . . neatly within the statutory and regulatory framework" of the Act. 772 F. 2d 759, 764 (CA11 1985). The court remanded the case "for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position. *Id.*, at 765 (footnote omitted). We granted certiorari, 475 U. S. 1118 (1986), and now affirm.

II

In enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey). To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including § 504, an antidiscrimination provision patterned after Title VI of the Civil Rights

Act of 1964.² Section 504 of the Rehabilitation Act reads in pertinent part:

“No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” 29 U. S. C. § 794.

In 1974 Congress expanded the definition of “handicapped individual” for use in § 504 to read as follows:³

² Congress’ decision to pattern § 504 after Title VI is evident in the language of the statute, compare 29 U. S. C. § 794 with 42 U. S. C. § 2000d, and in the legislative history of § 504, see, *e. g.*, S. Rep. No. 93-1297, pp. 39-40 (1974); S. Rep. No. 95-890, p. 19 (1978). Cf. TenBroek & Matson, *The Disabled and the Law of Welfare*, 54 Cal. L. Rev. 809, 814-815, and nn. 21-22 (1966) (discussing theory and evidence that “negative attitudes and practices toward the disabled resemble those commonly attached to ‘underprivileged ethnic and religious minority groups’”). The range of programs subject to § 504’s prohibition is broader, however, than that covered by Title VI, because § 504 covers employment discrimination even in programs that receive federal aid with a primary objective other than the promotion of employment. See *Consolidated Rail Corporation v. Darrone*, 465 U. S. 624 (1984); Note, *Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 Colum. L. Rev. 171, 174-175, and n. 21 (1980).

³ The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation; the Act’s original definition of the term “handicapped individual” reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation. After reviewing the Department of Health, Education, and Welfare’s subsequent attempt to devise regulations to implement the Act, however, Congress concluded that the definition of “handicapped individual,” while appropriate for the vocational rehabilitation provisions in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped. S. Rep. No. 93-1297, at 16, 37-38, 50.

"[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U. S. C. § 706(7)(B).

The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment.[but who] may at present have no actual incapacity at all." *Southeastern Community College v. Davis*, 442 U. S. 397, 405-406, n. 6 (1979).⁴

In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance. As we have previously recognized, these regulations were drafted with the oversight and approval of Congress, see *Consolidated Rail Corporation v. Darrone*, 465 U. S. 624, 634-635, and nn. 14-16 (1984); they provide "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U. S. 287, 304, n. 24 (1985). The

⁴See *id.*, at 39 ("This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped"); *id.*, at 37-39, 63-64; see also 120 Cong. Rec. 30531 (1974) (statement of Sen. Cranston).

regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual.⁶ "Physical impairment" is defined as follows:

"[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine." 45 CFR § 84.3(j)(2)(i) (1985).

In addition, the regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 84.3(j)(2)(ii).

III

Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to the testimony of Dr.

⁶ In an appendix to these regulations, the Department of Health and Human Services explained that it chose not to attempt to "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 CFR pt. 84, Appendix A, p. 310 (1985). Nevertheless, the Department went on to state that "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness" would be covered. *Ibid.* The Department also reinforced what a careful reading of the statute makes plain, "that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities." *Ibid.* Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition. *Ibid.*

McEuen, Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition. App. 11. Arline thus had a physical impairment as that term is defined by the regulations, since she had a "physiological disorder or condition . . . affecting [her] . . . respiratory [system]." 45 CFR § 84.3(j)(2)(i) (1985). This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U. S. C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Petitioners concede that a contagious disease may constitute a handicapping condition to the extent that it leaves a person with "diminished physical or mental capabilities," Brief for Petitioners 15, and concede that Arline's hospitalization for tuberculosis in 1957 demonstrates that she has a record of a physical impairment, see Tr. of Oral Arg. 52-53. Petitioners maintain, however, that Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.⁶

⁶ See Brief for Petitioners 15-16 (Act covers conditions that leave individuals with "diminished physical or mental capabilities," but not conditions that could "impair the health of others"); Pet. for Cert. 13-14 ("[T]he concept of a 'handicap' [should be limited] to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities. . . . [A]n individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individual's part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection").

We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.⁷

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U. S. C. § 706(7) (B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment.⁸ The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S. Rep. No. 93-1297, at 64.⁹

⁷The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United States contends that this is true in the case of some carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

⁸See n. 4, *supra*.

⁹Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the

Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.¹⁰

Act. For example, Representative Vanik, whose remarks constitute "a primary signpost on the road toward interpreting the legislative history of § 504," *Alexander v. Choate*, 469 U. S. 287, 295-296, and n. 13 (1985), cited as an example of improper handicap discrimination a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971). See also 118 Cong. Rec. 36761 (1972) (remarks of Sen. Mondale) (a woman "crippled by arthritis" was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her'"); *id.*, at 525 (remarks of Sen. Humphrey); cf. Macgregor, *Some Psycho-Social Problems Associated with Facial Deformities*, 16 *Am. Sociological Rev.* 629 (1961).

¹⁰The Department of Health and Human Services regulations, which include among the conditions illustrative of physical impairments covered by the Act "cosmetic disfigurement," lend further support to Arline's position that the effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself. 45 CFR § 84.3(j)(2)(i)(A) (1985). At oral argument, the United States took the position that a condition such as cosmetic disfigurement could not substantially limit a major life activity within the meaning of the statute, because the only major life activity that it would affect would be the ability to work. The United States recognized that "working" was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make "a totally circular argument which lifts itself by its bootstraps." *Tr. of Oral Arg.* 15-16. The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work. "[T]he primary goal of the Act is to increase employment of the handicapped." *Consolidated Rail Corporation v. Darrone*, 465 U. S., at 633, n. 13; see also *id.*, at 632 ("Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether § 504 was intended to prohibit other types of discrimination as well").

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.¹¹ Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.¹² Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.¹³ The Act is

¹¹ S. Rep. No. 93-1297, at 50; see n. 4, *supra*. See generally, TenBroek & Matson, 54 Cal. L. Rev., at 814; Strauss, Chronic Illness, in *The Sociology of Health and Illness* 138, 146-147 (P. Conrad & R. Kern eds. 1981).

¹² The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception. See R. Dubos & J. Dubos, *The White Plague* (1952); S. Sontag, *Illness as Metaphor* (1978).

¹³ Senator Humphrey noted the "irrational fears or prejudice on the part of employers or fellow workers" that make it difficult for former cancer patients to secure employment. 123 Cong. Rec. 13515 (1977). See also Feldman, *Wellness and Work*, in *Psychosocial Stress and Cancer* 173-200 (C. Cooper ed. 1984) (documenting job discrimination against recovered cancer patients); S. Sontag, *supra*, at 6 ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends . . . as if cancer, like TB, were an infectious disease"); Dell, *Social Dimensions of Epilepsy: Stigma and Response*, in *Psychopathology in Epilepsy: Social Dimensions* 185-210 (S. Whitman & B. Hermann eds. 1986) (reviewing range of discrimination affecting epileptics); Brief for Epilepsy Foundation of

carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.¹⁴ We conclude that

America as *Amicus Curiae* 5–14 ("A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the major impetus for discrimination against persons with handicaps").

¹⁴ Congress reaffirmed this approach in its 1978 amendments to the Act. There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others." 29 U. S. C. § 706(7)(B). See 124 Cong. Rec. 30322 (1978); Brief for Senator Cranston et al. as *Amici Curiae* 35–36; 43 Op. Atty. Gen. No. 12 (1977).

This approach is also consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others. See, e. g., *Strathie v. Department of Transportation*, 716 F. 2d 227, 232–234 (CA3 1983); *Doe v. New York University*, 666 F. 2d 761, 775 (CA2 1981).

the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.¹⁵

¹⁵The dissent implies that our holding rests only on our "own sense of fairness and implied support from the Act," *post*, at 289, and that this holding is inconsistent with *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1 (1981). It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it, neither of which the dissent discusses and both of which support the conclusion that those with a contagious disease such as tuberculosis may be considered "handicapped" under the Act. We also find much support in the legislative history, while the dissent is unable to find any evidence to support its view. Accordingly, the dissent's construction of the Act to exclude those afflicted with a contagious disease is not only arbitrary (and therefore unfair) but unfaithful to basic canons of statutory construction.

Nothing in *Pennhurst* requires such infidelity. The statutory provision at issue there was held to be "simply a general statement of 'findings'" and to express "no more than . . . a congressional preference for certain kinds of treatment." *Id.*, at 19. See *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U. S. 418, 423 (1987) ("In *Pennhurst* . . . the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional preference—at most a 'nudge in the preferred directio[n]'"). The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 could not be more stark.

Nor is there any reason to think that today's decision will extend the Act beyond manageable bounds. Construing § 504 not to exclude those with contagious diseases will complement rather than complicate state efforts to enforce public health laws. As we state, *infra*, at 288, courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable. Conforming employment decisions with medically reasonable judgments can hardly be thought to threaten the States' regulation of communicable diseases. Indeed, because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition. It is not surprising, then, that in their brief as *amici curiae* in support of respondent, the States of California, Maryland, Michigan, Minnesota, New

IV

The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.¹⁶ The basic factors to be considered in conducting this inquiry are well established.¹⁷ In the con-

Jersey, New York, and Wisconsin conclude that "inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies . . . [and] would not alter the balance between state and federal authority." Brief for State of California et al. 30.

¹⁶ A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren. Respondent conceded as much at oral argument. Tr. of Oral Arg. 45.

¹⁷ "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U. S. 397, 406 (1979). In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Ibid.* Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College v. Davis*, 442 U. S., at 412, or requires "a fundamental alteration in the nature of [the] program," *id.*, at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, Appendix A, p. 315 (1985) ("[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be

text of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include

“[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.” Brief for American Medical Association as *Amicus Curiae* 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.¹⁸ The next step in the “otherwise-qualified” inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry. See n. 17, *supra*.

Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is “otherwise qualified” for her job. The District Court made no findings as to the duration and severity of Arline’s condition, nor as to the probability that she would transmit the disease. Nor did the court determine whether Arline was contagious at the time she was discharged, or whether the School Board could

considered discrimination”); *Davis, supra*, at 410–413; *Alexander v. Choate*, 469 U. S., at 299–301, and n. 19; *Strathie v. Department of Transportation*, 718 F. 2d, at 231.

¹⁸This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.

have reasonably accommodated her.¹⁹ Accordingly, the resolution of whether Arline was otherwise qualified requires further findings of fact.

V

We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, dissenting.

In *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1 (1981), this Court made clear that, where Congress intends to impose a condition on the grant of federal funds, “it must do so unambiguously.” *Id.*, at 17. This principle applies with full force to § 504 of the Rehabilitation Act, which Congress limited in scope to “those who actually ‘receive’ federal financial assistance.” *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U. S. 597, 605 (1986). Yet, the Court today ignores this principle, resting its holding on its own sense of fairness and implied support from the Act. *Ante*, at 282–286. Such an approach, I believe, is foreclosed not only by *Pennhurst*, but also by our prior decisions interpreting the Rehabilitation Act.

Our decision in *Pennhurst* was premised on the view that federal legislation imposing obligations only on recipients of

¹⁹ Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies. See n. 17, *supra*; 45 CFR § 84.12 and Appendix A, pp. 315–316 (1985).

federal funds is "much in the nature of a contract." 451 U. S., at 17. See also *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U. S. 176, 204, n. 26 (1982). As we have stated in the context of the Rehabilitation Act, "Congress apparently determined it would require . . . grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *United States Department of Transportation v. Paralyzed Veterans of America*, *supra*, at 605, quoting *Consolidated Rail Corporation v. Darrone*, 465 U. S. 624, 633, n. 13 (1984). The legitimacy of this *quid pro quo* rests on whether recipients of federal funds voluntarily and knowingly accept the terms of the exchange. *Pennhurst*, *supra*, at 17. There can be no knowing acceptance unless Congress speaks "with a clear voice" in identifying the conditions attached to the receipt of funds. 451 U. S., at 17.

The requirement that Congress unambiguously express conditions imposed on federal moneys is particularly compelling in cases such as this where there exists longstanding state and federal regulation of the subject matter. From as early as 1796, Congress has legislated directly in the area of contagious diseases.¹ Congress has also, however, left significant leeway to the States, which have enacted a myriad of public health statutes designed to protect against the introduction and spread of contagious diseases.² When faced

¹ See, e. g., 42 U. S. C. §§ 243, 264; Act of May 27, 1796, ch. 31, 1 Stat. 474; see generally Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases*, 47 U. Cin. L. Rev. 537 (1978).

² The coverage of state statutes regulating contagious diseases is broad, addressing, *inter alia*, reporting requirements, quarantines, denial of marriage licenses based on the presence of certain diseases, compulsory immunization, and certification and medical testing requirements for school employees. See, e. g., *Ariz. Rev. Stat. Ann.* § 36.621 *et seq.* (1986) (reporting requirements); *Conn. Gen. Stat.* §§ 19a-207, 19a-221 (1985) (quarantines); *Fla. Stat.* §§ 741.051-741.055 (1985) (marriage licenses); *Mass. Gen. Laws* § 71:55B (1984) (certification requirements for school employees); *Miss.*

with such extensive regulation, this Court has declined to read the Rehabilitation Act expansively. See *Bowen v. American Hospital Assn.*, 476 U. S. 610, 642-647 (1986); *Alexander v. Choate*, 469 U. S. 287, 303, 307 (1985). Absent an expression of intent to the contrary, "Congress . . . 'will not be deemed to have significantly changed the federal-state balance.'" *Bowen v. American Hospital Assn.*, *supra*, at 644, quoting *United States v. Bass*, 404 U. S. 336, 349 (1971).

Applying these principles, I conclude that the Rehabilitation Act cannot be read to support the result reached by the Court. The record in this case leaves no doubt that Arline was discharged because of the contagious nature of tuberculosis, and not because of any diminished physical or mental capabilities resulting from her condition.³ Thus, in the language of §504, the central question here is whether discrimination on the basis of contagiousness constitutes discrimination "by reason of . . . handicap." Because the language of the Act, regulations, and legislative history are

Code Ann. § 37-7-301(i) (Supp. 1986) (compulsory immunization of school students); W. Va. Code § 16-3-4a (1985) (medical testing).

³In testifying concerning his reasons for recommending Arline's termination, petitioner Craig Marsh, Superintendent of Schools of Nassau County, Florida, stated that "I felt like that for the benefit of the total student population and . . . personnel in Nassau County and the public benefit, that it would be best if—not to continue or offer Mrs. Arline any employment." App. 62. Marsh added:

"I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all—after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it [was] in the best interest of the school system of Nassau County that she be dismissed from the classroom." *Id.*, at 81.

Before Arline's termination, Marsh consulted with Dr. Marianne McEuen, who testified that she recommended the termination because of the threat that Arline's condition posed to the health of the small children with whom Arline was in constant contact. *Id.*, at 12-17.

silent on this issue,⁴ the principles outlined above compel the conclusion that contagiousness is not a handicap within the meaning of § 504. It is therefore clear that the protections of the Act do not extend to individuals such as Arline.

In reaching a contrary conclusion, the Court never questions that Arline was discharged because of the threat her condition posed to others. Instead, it posits that the contagious effects of a disease cannot be “meaningfully” distinguished from the disease’s effect on a claimant under the Act. *Ante*, at 282. To support this position, the Court observes that Congress intended to extend the Act’s protections to individuals who have a condition that does not impair their mental and physical capabilities, but limits their major life activities because of the adverse reactions of others. This congressional recognition of a handicap resulting from the reactions of others, we are told, reveals that Congress intended the Rehabilitation Act to regulate discrimination on the basis of contagiousness. *Ante*, at 284.

This analysis misses the mark in several respects. To begin with, Congress’ recognition that an individual may be handicapped under the Act solely by reason of the reactions of others in no way demonstrates that, for the purposes of interpreting the Act, the reactions of others to the condition cannot be considered separately from the effect of the condition on the claimant. In addition, the Court provides no basis for extending the Act’s generalized coverage of individuals suffering discrimination as a result of the reactions of others to coverage of individuals with contagious diseases. Although citing examples of handicapped individuals described in the regulations and legislative history, the Court points to nothing in these materials suggesting that Congress contemplated that a person with a condition posing a threat to the health of others may be considered handicapped under

⁴See, e. g., 29 U. S. C. § 701 *et seq.*; 45 CFR pt. 84 (1985); H. R. Rep. No. 95-1149 (1978); S. Rep. No. 95-890 (1978); S. Rep. No. 93-1297 (1974); H. R. Rep. No. 93-244 (1973); S. Rep. No. 93-318 (1973).

the Act.⁵ Even in an ordinary case of statutory construction, such meager proof of congressional intent would not be determinative. The Court's evidence, therefore, could not possibly provide the basis for "knowing acceptance" by such entities as the Nassau County School Board that their receipt of federal funds is conditioned on Rehabilitation Act regulation of public health issues. *Pennhurst*, 451 U. S., at 17.

In *Alexander v. Choate*, *supra*, at 299, this Court stated that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court has wholly disregarded this admonition here.

⁵ In fact, two of the examples cited by the Court may be read to support a contrary conclusion. The 1978 amendments to the Rehabilitation Act, cited by the majority, *ante*, at 285, n. 14, specifically exclude from the definition of a handicapped person alcoholics and drug abusers that "constitute a direct threat to property or the safety of others." 29 U. S. C. § 706(7)(B) (emphasis added). If anything, this exclusion evinces congressional intent to avoid the Act's interference with public health and safety concerns. See Oversight Hearings on Rehabilitation Act of 1973 before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 2d Sess., 503 (1978) (statement of Rep. Hyde) ("Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons, balanced against the realities of public safety, economics, and commonsense"). This intent is also present in the statements of Representative Vanik relied on by the Court. See *ante*, at 283, n. 9. Representative Vanik expressed apparent disapproval of a court ruling that "'a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.'" *Ante*, at 283, n. 9, quoting 117 Cong. Rec. 45974 (1971) (emphasis added).

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